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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 535

THEODORE MARTIN SUNAL, PETITIONER,

vs.

DAVID R. LARGE, SUPERINTENDENT, FEDERAL PRISON CAMP, MILL POINT, W. VA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 25, 1946.

CERTIORARI GRANTED JANUARY 20, 1947.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT

No. 5490

UNITED STATES OF AMERICA ex rel.
Rudolph J. Sunal, *Relator-Appellant*

v.

DAVID R. LARGE, SUPERINTENDENT,
FEDERAL PRISON CAMP, MILL POINT,
WEST VIRGINIA
Respondent-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

APPENDIX

FOR APPELLANT'S BRIEF

HAYDEN C. COVINGTON
HORACE S. MELDAHL
Attorneys for Appellant

INDEX

	PAGE
Number and title of cause	*Front cover*
This Index	i
Petition for writ of habeas corpus	1
Order granting writ of habeas corpus and setting hearing	20
Motion to extend time	21
Motion to dismiss of respondent	21
Demurrer of respondent	22
Answer and return of respondent	23
Government's Exhibit No. 1 (material excerpts)	28-83
Transcript of proceedings (excerpts)	84-94
Findings of fact and conclusions of law	95
Order of the court	98
Proceedings in U. S. C. C. A., Fourth Circuit	101
Docket entries	101
Opinion, Chesnut, J.	102
Judgment	118
Order staying mandate	119
Stipulation as to record	119
Clerk's certificate	120

Petition for Writ of Habeas Corpus

[Title of court and cause]

To said UNITED STATES DISTRICT COURT

Now comes United States of America upon relation of Rudolph J. Sunal, relator herein and a resident of the Commonwealth of Pennsylvania, brother of petitioner, and on behalf of Theodore Martin Sunal, hereinafter designated petitioner, complains of David R. Large, Superintendent, respondent, and as grounds for relief respectfully shows:

1. Petitioner is a citizen of the United States and a resident citizen of the Commonwealth of Pennsylvania. Respondent is a citizen of the United States and a resident of the Commonwealth of West Virginia.

2. Petitioner is now imprisoned and illegally deprived of his liberty by respondent in the Federal Prison Camp, one of the United States Prisons operated by the Department of Justice, located at or near the City of Mill Point, County of Pocahontas in the Commonwealth and the Federal Southern District of West Virginia. Respondent is the Superintendent in charge of said Federal Prison Camp.

3. The cause or pretense of such illegal imprisonment and restraint of petitioner is a judgment rendered and entered on the 22d day of March 1945 in the District Court of the United States for the Western District of Pennsylvania, in a certain numbered cause on the docket of said court whereby said petitioner was found guilty of violating Title 50, United States Code, Section 311, in that he allegedly did unlawfully and knowingly fail and neglect to perform a duty required of him under and in execution of the Selective Training and Service Act of 1940 and the rules and regulations duly made pursuant thereto, in that he failed and neglected to submit to induction into the armed forces of the United States, and thereupon was committed to the custody of the Attorney General or his authorized

representative for imprisonment for a period of five (5) years. No fine or costs were imposed upon petitioner in said judgment. A copy of said judgment and commitment is attached hereto and marked as EXHIBIT A, and is incorporated herein and made a part hereof.

4. Said imprisonment and restraint are illegal and the judgment and commitment are void because

(a) The indictment (copy of which is attached hereto and marked as EXHIBIT B and incorporated herein and made a part hereof) and all subsequent proceedings were void for the reason that the draft boards and the armed forces did not have jurisdiction to order the petitioner to submit to induction because he was known to the boards to be and was a "duly ordained minister of religion" exempt from all training and service under the Act, and the action of the boards constituted a violation of due process of law; and

(b) the indictment and all subsequent proceedings were void for the reason that the United States District Court for the Western District of Pennsylvania did not have jurisdiction of the offense because the delinquency proceedings by the boards to institute the prosecution were void since the order to report for and submit to induction were void, and the action of the boards and of the armed forces constituted a violation of due process of law; and

(c) the judgment and commitment are void because upon the trial petitioner was denied the right of trial by jury and his right to prove any substantial defense to the indictment under his plea of "not guilty", contrary to Article III of the Constitution of the United States and the Fifth and Sixth Amendments thereto.

Petitioner alleges hereinafter in greater detail the reasons why said imprisonment and restraint are illegal. Upon a hearing hereof petitioner expects to make good each and every allegation of this petition.

5. Your petitioner duly registered under the Act with Local Board 26 for Allegheny County, Pittsburgh, Pennsylvania, on October 16, 1940. He was assigned Order Number 820. Thereafter he filed his Selective Service Questionnaire (DSS Form 40) with the said local board in the time and manner required by law. Petitioner showed that he was a minister of religion and customarily served as such minister and was formally ordained long prior to filing his questionnaire by the Watchtower Bible and Tract Society. Said Society is duly recognized by the Selective Service National Headquarters as a religious organization within the meaning of the Act. Petitioner established that he was a duly ordained minister of religion. He requested that the local board recognize and grant his exemption provided by Section 5 (d) of the Act and place him in Class IV-D pursuant to Section 622.44 of the Regulations. The local board refused to recognize his claim for exemption and classification in IV-D and illegally classified him in Class I-A on May 10, 1941, making him liable for training and service. He requested a personal appearance which was granted. At such appearance he protested against this classification. Noting that Series VIII of the Questionnaire did not correctly state his ministerial status as an ordained minister he submitted a statement and other evidence which was undisputed, giving substantial and uncontradicted proof that he was an ordained minister of religion serving as a minister and missionary evangelist of Jehovah's witnesses and assistant to the presiding minister of the Allegheny Unit of the Pittsburgh company of Jehovah's witnesses, preaching the gospel of God's Kingdom. He explained that the purpose of his ministry was to give

a testimony before the people that Jehovah is the Almighty God. He quoted his Scriptural ordination from Isaiah 61:1, 2. The local board thereafter, on July 1, 1941, continued him in Class I-A. He thereafter appealed to the board of appeal. Thereafter in December 1941 he appeared before a Hearing Officer of the Department of Justice who investigated his case and who stated: "I see nothing whatsoever in your file that could defeat your claim as a minister." Petitioner at said hearing submitted additional proof of his ministry and urged his complete exemption from all training and service because an "ordained minister of religion." On January 27, 1942, the local board mailed him Notice of Classification showing the board of appeal had denied his ministerial exemption and reclassified him to Class IV-E, subject to assignment for service in a civilian public service camp for conscientious objectors.

6. Petitioner was thereafter mailed an order to report for work of national importance. In the light of his commission to preach the gospel and the fact that he had adequately and conclusively proved his claim for ministerial exemption, he did not report in obedience to the order of the local board. Thereafter an indictment was returned against him, charging him with a violation of section 311 of Title 50 of the United States Code. Petitioner pleaded not guilty and was thereafter found guilty and sentenced on May 18, 1942 by the court and ordered to be confined for a period of two (2) years in an institution designated by the Attorney General. Thereafter petitioner was incarcerated. After serving eighteen and one-half (18½) months he was on December 6, 1943, granted a conditional release.

7. Petitioner was immediately appointed by the Watchtower Bible and Tract Society to serve as a full-time pioneer missionary evangelistic minister to establish churches for said Society and to preach the gospel of God's kingdom, application for said pioneer ministry having been filed in

October 1943 in behalf of petitioner by the then Superintendent of said prison camp. His conditional release expired on May 16, 1944, whereupon his local board mailed him on May 20, 1944, Notice of Classification placing him in Class I-A. Thereafter he took his preinduction physical examination, was duly accepted by the armed forces and was thereafter mailed Certificate of Fitness showing him as physically fit, acceptable for military service. He was granted a personal appearance by the local board at which time he supplied the local board with a complete and comprehensive statement as to his ministerial status, showing that he was serving full time as a pioneer missionary evangelistic minister of Jehovah's witnesses and the Watchtower Bible and Tract Society. He substantiated this information with affidavits from other ministers of Jehovah's witnesses showing that they recognized him as performing the duties and functions normally and ordinarily performed by duly ordained and regular ministers of the orthodox religious organizations. On June 24, 1944, the local board, after considering the information filed at the personal appearance, continued him in I-A, whereupon he appealed to the board of appeal. On September 12, 1944 he was mailed Notice of Classification by the local board showing that the board of appeal had denied his ministerial claim and affirmed the I-A classification, making him liable for training and service in the armed forces. He thereafter requested the President of the United States to review his classification and reverse the action of the draft boards denying him exemption as a minister of religion.

8. Thereafter, in October 1944, the National and State Directors of Selective Service declined to take an appeal to the President in behalf of petitioner. Such action by the Directors did not constitute a determination that petitioner was not a minister of religion, but was a refusal to exercise discretion under Section 628.1 of the Selective Service Reg-

ulations. Petitioner was mailed Order to Report for Induction on October 7, 1944, directing him to report on October 25, 1944. Petitioner reported on October 25, 1944 as directed because he wanted to go as far as he could in the process of induction without joining the armed forces, to protect his rights, because he was a "minister of religion", exempt from training and service, and the boards had unlawfully denied his claim and illegally ordered him to report for induction, contrary to the Act and Regulations.

9. At Local Board 26, Perry High School, N. S. Pittsburgh, Pennsylvania, petitioner appeared at 7:00 A. M. and answered the roll call at 7:20 A. M. on October 25, 1944. He left with the other inductees in car groups for the induction station in downtown Pittsburgh. He arrived with the other inductees at about 8:00 A. M. Thereafter he entered upon the process of the armed forces and went through all the routine thereof including a physical examination to discover whether his physical condition had changed since the last acceptance. Upon such physical examination he was again accepted for training and service by the armed forces. Thereafter petitioner was ordered to submit to induction, which he declined to do. He refused to submit to induction. He thereupon was taken before the commanding officer and others and again ordered to submit to induction and was informed that he was liable for prosecution in the courts for refusal to so submit and was again asked to submit, which he declined to do. He explained that he had appeared to make clear his position as an ordained minister exempt from military service and to exhaust his administrative remedies. He was ordered thereupon to "immediately vacate or leave the premises". He handed the commanding officer a detailed statement as to his position and then left at 11:30 A. M. Thereupon he was charged with a violation of the Selective Training and Service Act, as amended, by refusing to thus submit to induction.

10. By reason of petitioner having undergone all the necessary physical examinations, having been declared accepted by the armed forces, and complied with all other regulations except the order requiring him to submit to induction, petitioner exhausted all of his administrative remedies and completed the selective process so as to qualify himself for judicial review of the illegality of the action of the draft boards in classifying him as liable for training and service and in denying his claim for exemption as a minister of religion under Section 5 (d) of the Act, and to show that the administrative agency had denied all of his rights of procedural due process to a fair hearing by the board of appeal in that the local board was prejudiced, and at the hearing and personal appearance before the local board, the local board failed to make a full, adequate and complete record in writing of all the evidence offered at said hearing, and for each of the other reasons shown herein.

11. At the time petitioner registered under the Act, at the time he filed his questionnaire, at the time he was classified and when he was ordered to report for induction, as well as at the time of his trial in the district court, he was, and still is, a duly ordained minister of religion, and of Jehovah's witnesses and the Watchtower Bible and Tract Society. Said Society and Jehovah's witnesses are Christian organizations whose sole activity is preaching and disseminating Bible doctrine and conducting organized Bible studies publickly and in the homes of the people through duly authorized representatives who are ordained ministers of the gospel, missionaries and evangelists specially commissioned and trained to do such preaching. They are duly recognized, as aforesaid, by Selective Service National Headquarters and by the United States Government as a recognized religious organization under the Selective Training and Service Act of 1940, as amended.

12. Petitioner has consistently submitted full and conclusive evidence that he was and is one of Jehovah's witnesses and, as such, a duly ordained minister of Jehovah God and of the Watchtower Bible and Tract Society, a Christian organization. He submitted proof from other of Jehovah's witnesses with whom he was associated showing they recognized him as performing the duties of an ordained minister. He submitted proof that he is recognized as such minister by the Watchtower Bible and Tract Society. Proof of petitioner's ministerial status was submitted in the questionnaire, supported by affidavits from other ministers of Jehovah's witnesses and many other persons recognizing and corroborating his ministerial status, and by other documents, all of which proofs are now on file and in the possession of said local board with which petitioner was registered. At all times petitioner was devoting more hours to actual preaching and teaching of the gospel of Christ Jesus in the manner required by Jehovah's witnesses than are devoted by the ordinary clergymen of orthodox religions. At the time of receiving his classification of I-A he was devoting his full time to such preaching activity as a "pioneer" missionary evangelistic minister of Jehovah's witnesses. All the foregoing facts were duly and timely made known to the Selective Service System as a basis for consideration of his classification, and such facts are undisputed and uncontroverted.

13. The said draft boards that considered petitioner's case refused and failed to consider the foregoing proof that petitioner submitted, showing that he was an ordained minister of religion within the meaning of Section 5 (d) of the Act, and thereby—

(a) said boards acted contrary to and in violation of Section 622.44 of the Selective Service Regulations promulgated by the President of the United States,

concerning classification of regular and duly ordained ministers of religion;

(b) said boards ignored and disregarded and failed to consider or apply Opinion No. 14 and State Director Advice No. 213-B of National Headquarters of Selective Service concerning Jehovah's witnesses, under which petitioner would have been declared to be a duly ordained minister of religion;

(c) said boards discriminated against petitioner contrary to the due process clause of the Fifth Amendment to the United States Constitution;

(d) said administrative agency deprived petitioner of his procedural rights of due process to a full and fair hearing by a fair and unprejudiced board contrary to the due process clause of the Fifth Amendment to the United States Constitution.

14. Your petitioner asserts that there was no evidence, oral, documentary or written, before the draft boards which disputed his claim and evidence concerning his status as a minister of religion. The boards did not claim that petitioner was an impostor or fictitiously or falsely claimed that he was a minister of the Watchtower Bible and Tract Society and one of Jehovah's witnesses, and a recognized representative of said Society. There was no evidence in any form before the boards which showed that petitioner was not a minister of religion. By reason of the foregoing, the said draft boards did not have authority or jurisdiction under the statute to order him to report for training and service under the Act because, upon the facts and evidence before the boards, petitioner was exempt from all training and service. The said boards had no discretion or authority under the law to reject petitioner's claim that he was an "ordained minister of religion" and, as such, statutorily exempt, which said claim in effect constituted a

special plea to the jurisdiction of the said draft boards. The acts of the agency were ultra vires.

15. The foregoing acts and conduct of the local board in rejecting petitioner's claim for exemption when there was no evidence in the file contrary to such claim, constituted gross error specifically in violation of Sections 623.2, 627.13 and 622.44 of the regulations and Section 5 (d) of the Act. Furthermore, such acts and conduct of said local board constituted prima facie unlawful discrimination against petitioner and in favor of clergymen of orthodox religions because the undisputed proof showed that petitioner spent more time actually preaching the gospel than the orthodox clergy. The acts and conduct of said boards in rejecting petitioner's claim for exemption and ordering him to report for induction constituted and is a denial of his liberty and fundamental rights without due process of law, contrary to the Fifth Amendment to the United States Constitution.

16. Subsequent to the foregoing illegal action of the boards, the grand jury of the United States District Court for the Western District of Pennsylvania returned an indictment against petitioner (attached to this petition as EXHIBIT B) charging him with an alleged violation of Section 311 of Title 50 of the United States Code for having failed to submit to induction as ordered by said local board and the armed forces. The indictment was filed in said court. Petitioner pleaded "not guilty". On ———— 1945 the case against petitioner was called for trial to a jury before United States District Judge ———————— of said court. Upon the trial of said cause petitioner's entire draft board file was offered in evidence, which, with the exception of the order to report for preinduction physical examination and order to report for induction, showed on their face that petitioner was a minister of religion and as such claimed statutory exemption from training

and service and that he had been denied his rights contrary to the due process clause of the Fifth Amendment. To this action the petitioner objected and excepted on the grounds herein stated. Upon the trial he sought to offer evidence, including petitioner's testimony in his own behalf, showing that he was an ordained minister and that such fact was properly called to the attention of his local board as provided by the Regulations. To this action the petitioner objected and excepted on the grounds herein stated. In each instance, the judge ruled out all of such above evidence, holding that it was not material in that petitioner could not show the illegality of said boards' action in defense to the indictment. To this action the petitioner objected and excepted on the grounds herein stated. When the trial judge charged the jury as to the law of the case, he specifically denied the jury the right to consider whether petitioner was exempt from training and service because an ordained minister of religion and whether the agency had violated the law, the Constitution and petitioner's procedural rights. To this action the petitioner objected and excepted on the grounds herein stated. The trial judge told the jury that such was a matter solely for the determination of the draft boards and the action of such boards was unimpeachable in the criminal proceedings and conclusive upon the court and jury, and the jury could not and should not consider such issues or defenses to the indictment. To this action the petitioner objected and excepted on the grounds herein stated. The trial judge informed the jury that the only question was whether or not petitioner failed to submit to induction. To this action the petitioner objected and excepted on the grounds herein stated. The trial judge further instructed the jury that they could not and would not determine whether the draft boards illegally and unlawfully rejected and ignored petitioner's claim for exemption from military training and service. To this action the peti-

tioner objected and excepted on the grounds herein stated. To each action of the court in refusing to allow him to make said defense the petitioner objected and excepted and claimed that it was a violation of his constitutional right to deny him the right to make the defense tendered and requested, which constitutional objections have been restated in this petition. Moreover, at no time during the entire proceedings did the petitioner waive his rights or any of his objections.

17. The acts and conduct of the trial judge involving the said indictment against petitioner violated the fundamental rights of petitioner. The aforesaid conduct of the trial judge was an outright denial of the right of trial by jury upon the defenses under the Act, and was a transfer of judicial powers and functions of the trial judge and trial court from the United States District Court to the draft boards. The submission of the case to the jury on the one question of whether petitioner failed to submit to induction as ordered by the local board, and the refusal of all other questions was tantamount to putting petitioner through a "trial by ordeal" under a bill of attainder, contrary to the Constitution before the jury in the district court, because the real issue of duty under the Act was ignored and suppressed by the court. The above described conduct of the trial judge constituted a violation of Clause 3 in Section 9 of Article I of the Constitution as well as Article III thereof, and Amendments 1 and 6 thereto, guaranteeing the procedural rights of a defendant charged with crime; and thereby petitioner was denied his liberty and rights without process of law.

18. Petitioner would show that after having been adjudged guilty upon the verdict of the jury on ——— 1945, as charged in the indictment, he was sentenced on March 22, 1945 by the court and ordered to be confined for a period of five (5) years in an institution designated by the Attorney

General. Thereafter petitioner was incarcerated.

19. The manner in which the draft boards have construed Section 5 (d) of the Act, in denying petitioner's claim for exemption, violates the Fifth Amendment to the Constitution and it is void as construed and applied. The Act and Regulations have been construed so as to impose on a minister of religion exempt from duty an obligation to comply with illegal orders and thus said Regulations and Section 11 of the Act, containing the criminal sanctions clause, are void because in violation of Clause 3 in Section 9 of Article 1 of the United States Constitution and the Fifth and Sixth Amendments thereto. The courts and the boards have thus made the Act unconstitutional.

20. By reason of the foregoing, the entire proceedings against petitioner, including the return of the indictment, judgment and commitment, are illegal, a nullity and void, and just as though no proceedings ever were had against petitioner. Petitioner being now more fully informed of his legal rights, contrary to the United States Constitution, in such a manner as to make the proceedings a nullity and subject to review and collateral attack, upon an application for writ of habeas corpus.

21. The court is requested to review, in addition to or exclusive of the issue of exemption from duty, the evidence before the boards as to the classification made and/or as to petitioner's status under the Act, petitioner asserting that (a) there was no evidence before the boards to support their findings, classification and acts; (b) in arriving at their determination said boards acted arbitrarily and capriciously and in utter disregard of petitioner's rights; (c) said boards grossly and clearly abused their discretion, illegally misused their powers and disregarded the evidence submitted by petitioner showing he was a "minister of relgion", exempt from training and service; (d) said boards acted unwarrantedly on the substantive facts before them con-

cerning petitioner's ministerial status; (e) the findings of said boards do not have a basis in substantive evidence and are contrary to the undisputed evidence showing petitioner to be a minister of religion; (f) said boards were prejudiced against petitioner and discriminated against him because of his creed and faith, and otherwise departed from the applicable rules of procedural law and administrative regulations. That each of the foregoing grounds constitutes a denial of petitioner's rights, liberty and privileges without due process of law, contrary to the Fifth Amendment to the United States Constitution.

22. Petitioner desires to make good by proof and evidence the allegations hereinabove shown concerning illegal conduct of said boards and the said trial judge in the district court. This court is requested to cause to be issued subpoena duces tecum unto the clerks of said tribunals to produce all records and evidence in all proceedings had before said tribunals concerning petitioner for the purpose of a review by this court at the time of the hearing of this petition. Petitioner further says that a writ of certiorari should forthwith issue to said United States District Court and to said local board and its clerk and chairman directing them and each of them to certify to this court all said proceedings which took place before said tribunals concerning the status of said petitioner under the Selective Training and Service Act of 1940, as amended, and Regulations thereunder.

WHEREFORE, relator prays that the writ of habeas corpus be issued by this court or, in the alternative, a show cause order be issued, directed to said respondent, his deputies or agents and successors in office, and each of them, to bring and have the body of Theodore Martin Sunal in court at a time to be fixed by this court, together with the true cause of the detention of said petitioner, to the end that due inquiry can be had as to the foregoing allegations

concerning the illegality of petitioner's restraint and detention and that, upon a hearing hereof, the judgment of conviction and the commitment be declared null and void and that petitioner be discharged and restored to his liberty together with all rights as a citizen of the United States; and your relator further prays that a writ of certiorari issue, at the time the writ of habeas corpus or the notice of show of cause order issues upon this petition, directed to the clerk and the chairman of petitioner's local board No. 26, Allegheny County, Care Perry High School, N. S. Pittsburgh, Pennsylvania, and to the clerk of the United States District Court wherein petitioner was convicted and sentenced to the custody of respondent, directing them and each of them to certify to this court all the proceedings which took place before said boards or said court, together with all papers, affidavits, motions, judgments, orders, evidence, testimony and other matters pertaining to all the proceedings which took place before said boards or said court in the matter of said petitioner under the Selective Trainings and Service Act of 1940, as amended, resulting in the arrest or detention of petitioner for the alleged violation of the Act, Regulations, or order to report for and submit to induction, to the end that this court may proceed to determine the facts of this case in regard to your petitioner's restraint and detention, and thereupon make and enter such order herein as to the court seems proper. Relator prays for such other and further relief to which he may show himself justly entitled.

UNITED STATES OF AMERICA
By
Rudolph J. Sunal, Relator

HAYDEN C. COVINGTON
117 Adams Street
Brooklyn 1, New York

HORACE S. MELDAHL
210 Davidson Building
Charleston, West Virginia
Attorneys for Petitioner and
Relator

COMMONWEALTH OF PENNSYLVANIA, County of Butler ss:

Rudolph J. Sunal, being sworn, says that he is the petitioner's brother; that said petitioner, Theodore Martin Sunal, requested and authorized the undersigned Rudolph J. Sunal to begin this habeas corpus proceeding to obtain the release of petitioner, and directed relator Rudolph J. Sunal to obtain and employ counsel to prosecute the petition for writ of habeas corpus; that relator is duly authorized to bring this proceeding on behalf of petitioner and that relator has read the foregoing petition and that the allegations of fact contained therein are true and correct.

Rudolph J. Sunal

Subscribed and sworn to before me this
day of March 1946:
Notary Public

STATE OF NEW YORK, County of Kings, ss:

Hayden C. Covington, being sworn, says that he is a member of the bar of the Supreme Court of the United States and of the bars of the States of New York and Texas, and of the Fourth Circuit Court of Appeals of the United States; that he is duly authorized by the petitioner to institute habeas corpus proceedings to obtain release of said petitioner from the custody of the Superintendent of said Federal Prison Camp; that affiant has been requested by Rudolph J. Sunal, relator, to institute this habeas corpus proceeding in behalf of said petitioner; that affiant has read the foregoing petition for writ of habeas corpus and

says that all the allegations of fact contained therein are true and correct.

Hayden C. Covington

Subscribed and sworn to before me this
day of March 1946:

Notary Public

EXHIBIT A [COPY] JUDGMENT AND COMMITMENT

Filed Mar. 22, 1945
G. H. Berger, Clerk

D. C. Form No. 61a

DISTRICT COURT OF THE UNITED STATES
for the Western District of Pennsylvania

UNITED STATES

v.

Theodore Martin Sunal.

No. 11894 Criminal Indictment in one count for violation of U. S. C., Title 50 War Appendix 311, U. S. C. Selective Training & Service Act of 1940

On this 22nd day of March, 1945, came the United States Attorney, and the defendant Theodore Martin Sunal appearing in proper person, and by counsel and

The defendant having been convicted on Verdict of GUILTY of the offense charged in the Indictment in the above entitled cause, to wit:

1 Ct. Refusal to submit to induction

and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, IT WAS BY THE COURT

ORDERED AND ADJUDGED that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Five (5) Years in a Special Institution; no fine, no costs. And that

said defendant be further imprisoned until said defendant is otherwise discharged as provided by law.

IT IS FURTHER ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

[Signed] F. P. Schoonmaker
United States District Judge

EXHIBIT B [COPY] [INDICTMENT]
Selective Training and Service Act of 1940 — Title 50 War, Appendix 311, United States Code

IN THE DISTRICT COURT OF THE UNITED STATES
for the Western District of Pennsylvania
Of November Term, A. D. 1944

Western District of Pennsylvania, ss:

The Grand Jurors of the United States of America, now inquiring in and for the Western District of Pennsylvania, after being duly impaneled, sworn and affirmed and charged, as the term of said Court now pending, upon their oaths and solemn affirmations, respectively do present, that

THEODORE MARTIN SUNAL

hereinafter referred to as the defendant, late of said district, heretofore, to wit, on and about the twenty-fifth day of October, in the year of our Lord, one thousand nine hundred and forty-four, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, and within the jurisdiction of this Court (having, in pursuance of the Selective Training and Service Act of 1940, as amended, become a registrant with Local Board No. 26, located at Pittsburgh, Pennsylvania, which said Local Board was duly appointed and acting for the area in which he, the said defendant, is a registrant), did become de-

linquent, in this: that he, the said defendant, did unlawfully, wilfully and knowingly fail and refuse to submit to induction; he, the said defendant, having no valid reasons for having failed and refused to perform the duty as aforesaid, in violation of directions given to the said defendant under rules and regulations made pursuant to the Selective Training and Service Act of 1940 as amended; contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

[signed] Charles F. Uhl
United States Attorney

[Endorsed:]

PLEA AND WAIVER OF COUNSEL

The defendant, Theodore Martin Sunal, waives arraignment and pleads NOT GUILTY in open Court, this 21 day of March, A. D. 1944, and having been advised of his Constitutional right to have counsel,

[signed] Theodore M. Sunal
R. D. 1, Evans City, Pa.

Form No. 195
No. 11894 Crim.
INDICTMENT
1 Ct: Refusal to submit to induction
A true bill, Joseph A. Joyce (signed) Foreman.
Filed in open court this 15 day of Nov., A. D. 1944.

G. H. Berger [signed] Clerk.

Order Granting Writ of Habeas Corpus and Setting Hearing

The duly verified petition of Rudolph J. Sunal for a writ of habeas corpus was presented to me in chambers at Charleston, West Virginia, on the date shown below, and was read and considered by me. Upon the petition it is

ORDERED AND DECREED that the petition be filed by the clerk upon payment of the required deposit for costs; and it is further

ORDERED AND DECREED that the writ of habeas corpus be granted and the clerk of this court shall issue a writ to the Marshal of this court to be served upon David R. Large, Superintendent of the Federal Prison Camp at or near Mill Point, West Virginia, commanding him to appear before Honorable Ben Moore United States District Judge and produce the body of Theodore Martin Sunal at the courtroom of the United States District Court in the United States Court House at Charleston, West Virginia, on the 28th day of March A. D. 1946, at 11 o'clock in the forenoon on such day, at which time and place the parties shall be heard as to whether or not the petitioner, Theodore Martin Sunal, shall be discharged, or whether the writ of habeas corpus shall be discharged.

Done at Charleston, West Virginia, on the 11th day of March 1946.

Ben Moore
BEN MOORE
United States District Judge

Motion to Extend Time

Now comes the petitioner by Horace S. Meldahl, his attorney, and the respondent by Leslie E. Given, United States Attorney, and thereupon the petitioner moved the court to continue and extend the time for the return of the writ awarded therein.

It is therefore considered that the hearing herein set for March 28, 1946, be and the same hereby is continued to the 4th day of April, 1946, and that the body of the petitioner be not delivered unto the court until the 4th day of April, 1946, and that the respondent herein be not required to answer or make return to said writ until the 4th day of April, 1946.

ENTER: March 28, 1946
District Judge

Motion to Dismiss of Respondent

Now comes the respondent, David R. Large, Superintendent of the Federal Prison Camp, Mill Point, West Virginia, and moves the Court to dismiss the petition filed herein for the reason that it appears from the face thereof that the prayer thereof should be denied.

Superintendent, Federal Prison Camp,
Mill Point, West Virginia.

United States Attorney for the Southern District of West Virginia, Charleston, West Virginia.

Demurrer of David R. Large, Superintendent, Federal Prison Camp, Mill Point, West Virginia, Respondent

Now comes the respondent, David R. Large, Superintendent of the Federal Prison Camp, Mill Point, West Virginia, and demurs to the petition filed herein, and says that the said petition is not sufficient in law for the reason that the same does not show that the said petitioner, Theodore Martin Sunal, is being illegally detained by this respondent, and for the reason that it appears from said petition that the prayer thereof for writ of habeas corpus should be denied.

Superintendent, Federal Prison
Camp, Mill Point, West Virginia

United States Attorney for the
Southern District of West Virginia, Charleston, West Virginia.

Answer and Return of David R. Large

Now comes the respondent, David R. Large, Superintendent of the Federal Prison Camp, Mill Point, West Virginia, and without waiving his rights under the motion to dismiss and the demurrer heretofore filed herein, but expressly replying thereon, in compliance with the writ issued herein, produces the body of said Theodore Martin Sunal, and for answer and return, if that be necessary, says:

I

That it is not true that the said petitioner, Theodore Martin Sunal, is unlawfully restrained of his liberty by this respondent as Superintendent of the Federal Camp at Mill Point, West Virginia or otherwise; and denies that this Court has jurisdiction to hear or determine the matter set forth in his petition filed herein.

II

That it is not true that the draft boards alleged in said petition to have classified said petitioner refused and failed to consider any proof or evidence submitted to said boards, or either of them; that it is not true that the said boards acted contrary or in violation of the Selective Training and Service Act or of any regulation issued thereunder; that it is not true that said boards ignored and disregarded or failed to consider Opinion No. 14 of the State Director No. 213-B of the National Headquarters of Selective Service concerning Jehovah's Witnesses; that it is not true that said boards discriminated against said petitioner contrary to the due process clause of the Fifth Amendment to the United States Constitution; that it is not true that said board deprived petitioner of any procedural right of due process to a full and fair hearing by an unprejudiced board; that it is not true "That there was no evidence, oral, documentary, or written before the draft boards which disputed the claim of said petitioner concerning his ministerial classification"; that it is not true that said draft boards did

not have authority or jurisdiction to classify the said petitioner; that it is not true that said board "had no discretion or authority under the law to reject petitioner's claim that he was an ordained minister of religion"; that it is not true that the acts and conduct of said local board constituted prima facie, unlawful discrimination against petitioner; it is not true that the acts of the said boards, or either of them, constituted a denial of his liberty or of any fundamental right without due process of law; and that it is not true that any order, or proceeding of said boards, or either of them, was illegal, void or without the jurisdiction of such board.

III

Respondent further answering says that, as he is informed and believes, the said boards duly considered all evidence submitted to them by said petitioner, or other person, with reference to his classification; that in the consideration thereof and in the classification of said petitioner, the said boards at all times, acted within authority vested in them by the Selective Training and Service Act or by the regulations duly promulgated in accordance with the provisions of said Act; that there was ample evidence submitted to said boards to warrant the classification finally given to him by the said local board, and by the appeal board to which said petitioner appealed; that the said boards finally determined that the claimed status of said petitioner as a minister did not come "within the purport and intent of the Selective Service Act regarding ministers"; that the petitioner was not denied an opportunity to submit any evidence, was not denied a personal appearance, was not denied an appeal, and was not denied any other right afforded to him by the Selective Training and Service Act or the regulations promulgated pursuant thereto, but says that there was evidence before the said boards to support the classification finally given petitioner.

IV

Respondent further answering says that it is true that the said draft boards finally placed the said petitioner in Classification I-A; that it is true that thereafter an order was duly issued by the local board directing the said petitioner to appear for pre-induction examination, and to submit to induction; that pursuant to said order said petitioner did appear, was found physically fit for service in the Armed Forces and accepted by the Armed Forces for such service, and that said petitioner refused to be inducted into the Armed Forces; that thereafter said petitioner was indicted by the Grand Jury of the United States District Court for the Western District of Pennsylvania for having failed to submit to induction as ordered by said local board, and that upon the trial of said charge, petitioner was convicted of having violated the Selective Training and Service Act. That it is also true that the said United States District Court for the Western District of Pennsylvania, on March 22, 1945, ordered the said petitioner to be confined for a period of five years in an institution to be designated by the Attorney General of the United States. A true copy of the order of said Court sentencing the petitioner as aforesaid is attached hereto as a part hereof, and for identification, marked Respondent's Exhibit "A". That it is true that thereafter the Attorney General of the United States directed the said petitioner to be confined in the Federal Prison Camp at Mill Point, West Virginia, and that this respondent is Superintendent of said institution, and that said petitioner is now held in custody by this respondent under and by virtue of the judgment of the Court aforesaid.

V.

Respondent further answering says that a certified copy of the docket entries made and entered in the criminal action wherein said petitioner was convicted as aforesaid, is

filed herewith, attached hereto, as part hereof, and for identification, marked Respondent's Exhibit "B". Your respondent also files herewith and prays that the same be read and considered as part of his answer and return, the "Cover Sheet" of said petitioner, containing all of the evidence and proceedings before the draft boards aforesaid of the said petitioner, which "Cover Sheet", for further identification, is marked Respondent's Exhibit "C".

VI

Respondent further answering says that it is true that the custody of said petitioner was delivered to your respondent as Superintendent of said Federal Prison Camp; and as the authorized representative of the Attorney General of the United States, and has been ever since, and now is, retained in custody by respondent; but denies that such restraint is unlawful, but says that such detention is in pursuance of the judgment of the United States District Court for the Western District of Pennsylvania as aforesaid; and respondent denies that said District Court did not have jurisdiction to enter said order and denies that the said District Court did not have jurisdiction to sentence said petitioner, as aforesaid, and denies that said petitioner is entitled to be released from the custody of this respondent.

VII

Respondent further answering says that he is not advised as to the allegations contained in said petition not herein denied or admitted to be true, and as to such, calls upon the said petitioner for full and specific proof thereof.

WHEREFORE, having fully answered and made return to this writ issued herein, respondent prays that he may be hence dismissed, with his reasonable costs in his behalf expended, and that said petitioner be remanded to

his custody, as required by said lawful judgment and commitment.

Superintendent, Federal Prison Camp,
Mill Point, West Virginia

United States Attorney for the Southern
District of West Virginia, Charleston
West Virginia.

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, TO-WIT:

Before the undersigned authority, this day personally appeared Frederick R. Bouzard of the Federal Prison Camp, Mill Point, West Virginia, acting for David R. Large, Superintendent of said Federal Prison Camp, named in the foregoing answer and return, who, being first duly sworn upon his oath says that he has read the foregoing answer and return and knows the contents thereof, and says that the facts stated therein are true, except insofar as they are therein shown to be upon information and belief, and that insofar as they are shown to be upon information and belief, he believes them to be true.

Taken, subscribed and sworn to before me this .... day of March, 1946, in my said County, as witness my hand and official notarial seal.

My Commission expires .....

Notary Public in and for the County
of ....., West Virginia.

EXHIBITS

Government's Exhibit No. 1

SELECTIVE SERVICE QUESTIONNAIRE

[D. S. S. Form 40]

[Material Excerpts]

Order. No. 820 Serial Number 60
Date of mailing January 11, 1941
Name: Theodore Martin Sunal
Address: 618 Danbury St., N. S., Pittsburgh
Allegheny County Pennsylvania

• • •

This Questionnaire must be returned on or before January 17, 1941.

L. Williamson, Member of Local Board.

• • •

Series II.—PHYSICAL CONDITION

1. To the best of my knowledge, I have no physical or mental defects or diseases.
2. I am not an inmate of an institution.

Series III.—EDUCATION

1. I have completed 4 years of elementary school and 4 years of high school.
2. I have had the following schooling other than elementary and high school: None.

Series IV.—OCCUPATION OR ACTIVITY

1. I am working at present.
2. The job I am working at now is: Automotive carburetor and electrical mechanic.
3. I do the following work in my present job: Service carburetors and electrical devices.
4. I have done this kind of work for six years.

5. My average weekly earnings in this job are $25.00.
6. In this job I am an employee, working for salary, wages, commission, or other compensation.
7. My employer is: Bendix-Westinghouse Automotive Air Brake Co. 4725 Center Ave., whose business is Mfg.-Sales and Service of Air-brake equipment.
8. Other business or work in which I am now engaged is None.

• • •

10. I am not licensed in a trade or profession:
11. I am at present an apprentice under a written or oral agreement with my employer.
12. Other facts which I consider necessary to present fairly the occupation which I have described, or my connection with it, as ground for classification are: None.

• • •

Series VII.—DEPENDENCY

1. (a) I am single.
2. I have no children.

• • •

3. The following persons live with me in a home maintained by me and are entirely or partly dependent on my earnings from my work in my business, occupation, or employment, and have no other sources of income except as stated below:
Mr. Tobias Sunal Male Age 56 Father
Date when support began 1937
Mrs. Clara Sunal Female Age 45 Mother
Date when support began 1937
Dependent's income, last 12 months other than board and lodging provided by the registrant in his home. Contributed by the registrant [for both father and mother] $1250.
The net cost to me of maintaining my home during the last 12 months, after deducting $ ..... contributed by others than myself for the support of such dependents was $350.

• • •

5. The cause of the dependency of any persons over 18 years of age listed above is as follows: Moral obligation on my part to support aging parents.

• • •

7. Of the amounts contributed by me to dependents listed above, only $ none (separately), contributed to parents jointly, was in payment for my own board and/or lodging.
8. The income I earned from my work in my business, occupation, or employment during the past 12 months was $1700.
9. My income from all other sources during the past 12 months was $ x
10. The following is a list of all property owned by (or held in trust for) either me or my dependents, the value of such property, and the net income received by either me or my dependents from such property during the past 12 months:
Mr. & Mrs. T. C. Sunal, residence at 618 Danbury St., Pittsburgh. This is my home. Value after deducting encumbrances: $1800. Net income from such property, none.
Mr. & Mrs. T. C. Sunal, rural property. Value after deducting encumbrances $2500. Net income from such property, none.
These properties are owned jointly by my parents.
11. I do not rent the house in which I live.

• • •

Series VIII.—MINISTER,
OR STUDENT PREPARING FOR THE MINISTRY

1. (a) I am not a minister of religion.

• • •

Series IX.—CITIZENSHIP

1. I was born at Pittsburgh, Pennsylvania, United States
2. I was born on November 8, 1916
3. My race is white.
4. I am a citizen of the United States.

• • •

Series X.—CONSCIENTIOUS OBJECTION TO WAR

I claim the exemption provided by the Selective Training and Service Act of 1940 for conscientious objectors because I am conscientiously opposed, by reason of my religious training and belief, to the type or types of service checked below:

[x] Combatant military service
[x] Noncombatant military service

• • • •

REGISTRANT'S STATEMENT REGARDING CLASSIFICATION

In view of the facts set forth in this Questionnaire it is my opinion that my classification should be Class IV.

• • •

Registrant sign here Theodore M. Sunal
Subscribed and sworn to before me this 15 day of Jan. 1941.
Louis H. McMahan, Notary Public

• • •

MINUTE OF ACTION BY LOCAL BOARD

The Local Board classifies the registrant in Class I, Subdivision A by the following vote: Ayes 2, Noes ..
May 10, 1941 [s] A. Groetzinger, Member

APPEAL TO BOARD OF APPEAL

I hereby appeal from the classification by the Local Board in Class I, Subdivision A.
7/1/41 [s] Theodore M. Sunal

MINUTE OF ACTION BY BOARD OF APPEAL

The Board of Appeal classifies the registrant in Class IV, Subdivision E by the following vote: Ayes 4 Noes 0.
January 27, 1942 [s] John S. Laughlin
Chairman, Appeal Board 9-B

• • •

MINUTES OF OTHER ACTIONS

June 24 1941: The registrant appeared on May 15, 1941 and asked for reclassification from 1-A to 4-D, claiming to be a minister of Christianity; also on the grounds that he is a conscientious objector. He filed with the Board considerable documentary evidence to support his claims. Due to the fact that there was no quorum to act on this case until tonight,—action was withheld. The Board after reviewing the same, declined deferment as a minister because it does not believe the registrant's status comes within the purpose and intent of the Selective Service Act regarding ministers. As to his being a conscientious objector the question is referred to the Appeal Board or Department of Justice. Vote of 3 Board Members. AMJN—Sec.
7-29-41 Appeal Board - It was determined by three votes to none that apart from the question of conscientious objection registrant should be classified in Class I-A.

John S. Laughlin
Chairman Appeal Board 9-B

5/19/42 Reg. placed Class 4-E-G

5/19/44	Probation period ended May 18, 1944 Registrant reclassified to Class I-A 3-0 Groetzinger
5/20/44	Form 57 mailed
6/23/44	After Hearing on June 9, 1944 and after due consideration of facts presented Board sees no change in status of registrant than it was when classified by appeal Board on 7/29/41 Registrant so classified to Class I-A 3-0 Groetzinger
6/24/44	57 mailed
7/17/44	215 mailed - Pre Ind. 7-28-44
8/4/44	218 mailed

Aug 31 1944	APPEAL BOARD 9-B CLASS I-A AYES 4 NOES 0 Joseph H F——t Member
9/12/44	Per Appeal Board Decision as above Class to remain 1-A G. C. W. (signed by A. Windhorst)
9/12/44	57 mailed
9/23/44	See letter from State Director Legal Advisor
9/27/44	See letter from State Director Legal Advisor
10/7/44	Mailed 150
10-24-44	See letter from Legal Advisor, S. S. Headquarters Harrisburg in answer to our letter of 10-19-44 concerning registrant's letter with enclosures dated 10-18-44. In an effort to contact the registrant at his place of Employment, was advised by John H. Leasure of George Maier Garage that Mr. Sunal left their employ "several months ago". This fact was never reported by the registrant.
10-25-44	Registrant was delivered to the Induction Station 10-25-45 for Induction but he refused to be inducted.
4-7-45	Letter of April 6, 1945 from U. S. Attorney Charles F. Uhl, advises registrant sentenced to five years inprisonment in Federal Institution. Reclassed to 4F. G. C. W.

SPECIAL FORM FOR CONSCIENTIOUS OBJECTOR

[D. S. S. Form 47]

Series I.—CLAIM FOR EXEMPTION

* * *

B. I claim the exemption provided by the Selective Training and Service Act of 1940 for conscientious objectors, because I am conscientiously opposed by reason of my religious training and belief to participation in war in any form and to participation in any service which is under the direction of military authorities.

[s] Theodore Sunal

Series II.—RELIGIOUS TRAINING AND BELIEFS

1. Describe the nature of your belief which is the basis of your claim made in Series I above.

I am a believer in the word of Almighty God, the Bible, which clearly points out the laws and commands that a christian must be obedient to.

2. Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim made in Series I above.

From childhood, through parental guidance have I been taught the necessary steps for true christianity. The bible used as the source of all training.

3. Give the name and present address of the individual upon whom you rely most for religious guidance.

I do not rely upon any individual for guidance. My sole reliance is in the words of the Bible. Psa. 119:105.

Under what circumstances, if any, do you believe in the use of force?

I do not under any circumstances believe in aggressive force.

5. Describe the actions and behavior in your life which

in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

At no time in my life have I taken part in any demonstration or action that could show guilt in severance of my christian conviction.

6. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim made in Series I above? If so, specify when and where.

As one of Jehovah's witnesses I have partaken in door to door testimony service, presenting the gospel message to those who cared to hear according to Matt. 24:14 and Isaiah 61:1, 2.

Series III.—GENERAL BACKGROUND

1. Give the name and address of each school and college which you have attended, together with the dates of your attendance; and state in each instance the type of school (public, private, church, military, commercial, etc.).

D. B. Oliver High School, public school located at Brighton Road, Pittsburgh. Dates attended from 1930 to 1934.

2. Give a chronological list of all occupations, positions, job, or types of work, other than as a student in school or college, in which you have at any time been engaged, whether for monetary compensation or not, giving the facts indicated below with regard to each position or job held, or type of work in which engaged:

Mechanical work, Employer J. Wolner's Garage, Cleveland, Ohio from 1934 to 1936

Mechanical work, Employer Frank Heinrich (address unknown) from 1936 to 1937

Mechanical work, Employer Bendix Corp., Pittsburgh from 1937 to date

• • •

4. Give the name, address, and country of birth of your parents and indicate whether they are living or not.

Mother and Father, Lab, Czechoslovakia. Both are living

Series IV.—PARTICIPATION IN ORGANIZATIONS

* * *

2. Are you a member of a religious sect or organization? Yes.

(a) State the name of the sect, and the name and location of its governing body or head if known to you:

Watchtower Bible & Tract Society, Brooklyn, New York.

(b) When, where, and how did you become a member of said sect or organization?

I have been raised from childhood as one of Jehovah's witnesses.

(c) State the name and location of the church, congregation, or meeting where you customarily attend:

Kingdom Hall, 907 Middle St., Pittsburgh.

(d) Give the name and present address of the pastor or leader of such church, congregation, or meeting:

Mr. Joseph Petti, R. D. 4, Box 402, Millvale, Pa.

(e) Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war:

No creeds exist with regard to participation in war. Sole responsibility being upon individual and his devotion to written law of God.

3. Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than religious or military:

A. F. L. Mechanic Union, Lodge No. 1060. I am listed

as a member and have become affiliated with same through my trade.

• • •

(Registrant sign here) Theodore M. Sunal
Subscribed and sworn to before me this 15 day of Jan. 1941.
Louis H. McMahan, Notary Public

ALLEGHENY UNIT OF PITTSBURGH COMPANY
OF JEHOVAH'S WITNESSES
111 Federal Street, Rodgers Building
N. S., Pittsburgh, Penna.
May 1, 1941.

TO WHOM IT MAY CONCERN:

This is to certify that Theodore Martin Sunal is a regular and an ordained minister of God serving as such for Jehovah's Witnesses under the jurisdiction of the Allegheny Unit of Pittsburgh Company of Jehovah's Witnesses and that he has been so actively engaged regularly since the year 1935. I have known him personally for this period of time and can vouch as to his sincerity and integrity.

JOSEPH J. PETTI

Joseph J. Petti,

Unit Servant.

State of Pennsylvania,
County of Allegheny,
Subscribed and sworn to before me this 2nd day of May A. D. 1941.

JOSEPH P. KURCINA, Notary Public
My Commission Expires
March 6, 1943

SELECTIVE SERVICE SYSTEM
LOCAL BOARD NO. 26
CITY OF PITTSBURGH 32
Perry High School 703
Perrysville Ave. & East Street
PITTSBURGH, PENNA. 026
(Stamp of Local Board)
June 27th, 1941.

Mr. Theo. M. Sunal,
618 Danbury St.,
N. S. Pittsburgh, Pa.

Dear Sir: Order No. 820.

At a meeting of this Local Selective Service Board, on 6-24-41,— your appeal for a 4-D Classification from 1-A was rejected by this Board.

If it is your intention to appeal this 1-A classification further, it will be necessary for you to appear at the office of this Local Board *within five* (5) days from the date of this notice so that the necessary signature can be obtained.

Very truly
B. J. CONLON
Clerk

Regist Oct 16, 1941
Filed Questione in Feb 1941
Notice of Phys Exam Apr 29, 1941
Appeared 5-7-41
Notice of Class 1-A 2 weeks later
Appeared on 5-15-41 for reclass to IV-D
Rejected as above 6-27-41 (on Questionairre 6/24/42)
Reappealed as Minister with o within 5 days
Aug. (F. b. I.) investigation
Notice of Hearing Dec 18, 1941
Heared Dec. 30, 1941

July 8th 1941

The registrant, after being notified by the board that he was placed in A-1, asked permission to appear before the entire board and be reclassified.

The board granted the permission and the registrant appeared this evening. He added very little to the previous evidence regarding his being a minister of christianity. He stated he has no regular church or institution where he preaches, but goes from house to house in the evening to teach their doctrines. He receives absolutely no salary or remuneration for this, and depends entirely on his secular job to support himself.

Theodore M. Sunal
1422 W. North Ave.
Pittsburgh Pa
Draft no. 820
Local Board 26
Perry High School
July 10, 1941

Local Board #26,

Dear Sir:

I wish to have this statement appended to my questionaire and documentary reports. I wish to submit same do to recent rulings and changes. This addition to assist clarification of my position in reclassification appeal to Board of Appeals. In considering this statement refer also to Vol. III Opinion 14 of National Headquarters Selective System.

As one of Jehovah's witnesses I have made (primarily) a consecration of my life and entire devotion of same to the beliefs and teachings of the Holy Bible. This position I have taken through careful parental assistar e and correspondence instruction publications of the Watch Tower Bible and Tract Society of New York. I have always when

opportune, served as a field publisher, active ministery from door to door winter and summer proclaiming the Theocracy the only hope for mankind (see Mathew 6th chapt. also Acts 20:20 and 1 Corin. 9:16.) I also serve as assistant to the Treasurer of the Allegheny unit of Jehovah's witnesses. Also retaining the capacity of Study Conductor for a specified area of the Allegheny company.

My questionaire discloses that I engage in a secular occupation. I take this opportunity to qualify that section in this respect. As a true christian and ordained servant (see Isaih 61:1, 2.). I do retain this job for self support and family likewise, to which I am obligated, and in no wise desire ever to become a burden to a community or parish. In this behalf I have supported the imediate family, and retained same from relief roles in the past.

With the presentation of these facts in addition to evidence presented with questionaire I desire your careful consideration for reclassification as appealed

Sincerely yours,

Theodore Sunal

P. S.- I wish to make note that their is no renumeration received whatsoever by myself for those services rendered in behalf of the local company of Jehovah's witnesses.

603 Highland Place
BELLEVUE
Pittsgurgh, Pa.

December 23, 1941.

To Whom It May Concern:

The bearer, Theodore Sunol, has been known to me personally since he was a little boy. I know his parents and all the members of his family.

Theodore was reared in a christian home and was a scholar in my Sunday School class for some time. I feel sure he is earnest in his endeavors to serve the Lord because he has been active in the work of preaching the gospel to others, as the faithful followers of Christ are commanded to do. His family has for many years been devoted to the Lord's work and Theodore also has engaged in this work with diligence and integrity.

All of which is respectfully submitted.

(Mrs.) Minnie J. Wilson
(Mrs.) MINNIE J. WILSON

Sworn and subscribed
to before me this
29th day of December A. D. 1941
Ursula M. Serenco
Notary Public
URSULA M. SERENCO, Notary Public
MY COMMISSION EXPIRES
MAY 20, 1945

Exhibit 6
M W Acheson, Jr
Hearing Officer

Exhibit 2
M W Acheson, Jr
Hearing Officer

104 Sampson st.
N. S Pittsburgh, Pa.
December 28, 1941
Order No. 820
Local Board 26
City of Pittsburgh
Perry High School
Pittsburgh, Pa.

Board of Appeals, Members
Dear Sirs:

In re: Notice of Hearing dated Dec. 18, 1941 and an attached form letter, "Instructions To Registrants Whose Claim For Exemption As Conscientous Objectors Have Been Appealed" dated Feb. 11, 1941. Complying with those instructions as stated under par. 2 (two). I made a personal appointment with Mr. M. W. Acheson Jr. the assigned Hearing Officer on Dec. 24, 1941. At this meeting he (Mr. Acheson) reviewed my file and reports, and at which time stated, "there is no evidence that could be construed as evidence which is unfavorable to or tend to defeat my claim" within his jurisdiction. Further during the course of my interview, Mr. Acheson stated from my questionairre, "that although much documentary evidence was presented supporting my claim as minister, the Local Board denied myself those rights extended to Ministers of Religion or class IV D as provided by law.

I at that time appealed on those grounds as a Minister of Christianity, and as the Board stated with conscientous objection. I wish to now submit to you a statement for consideration in view of further light and opinions rendered in my behalf and like representatives by General L. Hershey of the General Staff of the United States Army. Prior to

the time opinion No. 14 was rendered as of June 12, 1941 File Reference 111—Ministers Sec 5 (d) Par. 360, S. S. R. by General Lewis B. Hershey, my questionairre was returned and in the hands of the Local Board early May 1941 In that statement under Series VIII of the questionairre, I refused to concede or acknowledge, denied myself the title of Minister of Religion. This I did on grounds alone that as defined and understood by myself and the scriptures do teach that "Religion is doing anything that is contrary to the will of God Almighty." I also wish to grant for benefit of clarification that, "Christianity is the following in the footsteps of Christ Jesus and doing the will of his Father Jehovah." If the term Christianity had been used instead of Religion in that Series VIII of the questionairre I would have thus answered.

1. (a) I *am* a minister of Christianity
   (b) I *do* customarily serve as a minister of Christianity
   (c) I *have been* a minister of the Allegheny Company of Jehovah's Witnesses.
   (d) I have been formally ordained.

This I quote from opinion No. 14, "By their adherence to the organization of this religious corporation the unincorporated body of Jehovah's Witnesses are considered to constitute a recognized religious sect." Thus the Selective Service Act has provided for reclassification to those concerned.

I sincerely appeal for your careful consideration of answer no. 5 (five) of the aforementioned opinion, and the expressions in documentary evidence supplied in my questionairre file. Exhibit "D" to which has been sworn and willing to personally vouch, Mr. J. Petti. Likewise exhibit "C" which is duly and recognized authorization of ministerial status by the Watch Tower Bible & Tract Society, an ordination to preach the gospel of the Kingdom of God. This covenant I have agreed to, "The spirit of the Lord is

upon me, he hath annointed me to preach good tidings to the meek, he hath sent be to bind up the brokenhearted, to proclaim liberty to the captives, and the opening of the prisons to them that are bound, proclaim the acceptable year of our Lord, and the day of vengeance of our God: to comfort all that mourn." Isaih 61:1, 2. This declaration is not only mandatory but considered truly of National Importance at this time, and as a minister of true christianity must continue of, 'necessity is laid upon me: yea woe is unto me if I preach not the gospel: though I preach the gospel I have nothing to glory of.' 1 Corin 9:16 In addition I wish to add, assisting you in arriving at a just opinion, again referring to ans. 5 (five) of the opinion #14. I occupy the capacity of Area Study Leader of a specified district, wherein the responsibilities are comparable and stand in relationship as a regular or duly ordained minister in other religions.

Theodore Sunal Re: Order No. #820 R, D. #1 Evans City, Pa.

Local Board # 26

State of Pennsylvania, County of Allegheny

I Theodore Sunal being duly sworn say, that I am a minister of the gospel, fully ordained by the grace of Jehovah God, the Omnipotent. To deliver the glad message of 'comfort to all that mourn, preaching good tidings unto the meek'.

That I am a representative of the Watch Tower Bible and Tract Society now acting in the capacity of full time minister in my respective judicial district in Western Pennsylvania. May it be known that I am a releasee from a Federal prison and abiding by the probate rules until a complete release is issued.

That at the time of my committed sentence May 1941 I was forcefully capriciously and arbitrarily taken away from my assigned duties of serving the Almighty God and His Theocracy. Having now ascended from the bonds of incarceration my zeal to serve forever in the army of Christ Jesus and a cause of righteousness is irreversible.

Should question arise as to my correct classification which is that of Minister IV-D under the Selective Service Rules and Regulations my request is that the State Director of Selective Service be consulted in regards thereto.

This is to inform you that my address has now been changed to that of R. D. #1 Evans City, Pennsylvania.

Respectfully submitted
THEODORE SUNAL
Theodore Sunal

State of Pennsylvania
County of Alleghany
Sworn to and subscribed to before
me this 24th day of December, 1943
URSULA M. SERENCO, Notary Public
MY COMMISSION EXPIRES MAY 20, 1945

January 4th, 1943.

Seymour Sheriff, Legal Advisor.
Commonwealth of Pennsylvania,
Headquarters for Selective Service
P. O. Box No. 92, Harrisburg, Penna.
Dear Sir:

In Re: SUNAL, Theodore Martin, Sel. Ser. No. 820
pres. add: R. D. #1, Evans City, Penna.
Class 4-E.

The above captioned subject appeared at the office of this Local Board on Dec. 29th, 1943, and has given us a change of address as per the above,— RD #1, Evans City, Pa.

For your information this registrant (in 4-E Class) is a Conscientious Objector to War and also a member of the sect, Jehovah Witnesses. Because of the fact that we would not report for duty at an Objector's Camp, he was sentenced in the Federal Court at Pittsburgh, Pa., on May 19th, 1942, by Judge Nelson McVicar and was given a two year term sentence and fined $100.00 & costs under Indictment No. 10983. As we understand he was sent to Federal prison at Mill Point, Va., under his number 1309 and the sentence was to run until 5/18-44. He was released from that institution on 12/6-43 but is still under the jurisdiction of the Federal Court.

While this Board is carrying the registrant in Class 4-E, he claims, as per the attached, that he is a minister of the Gospel and that his class is 4-D.

The reason for this letter is a request that you advise us what procedure this Board should now take in regards to this registrant, taking into consideration that he will not be entirely discharged from the jurisdiction of the Court until May 18th, 1944.

Will you advise us regarding this,— thank you.

AG-c
enc

Very truly
Chairman for Board.

COMMONWEALTH OF PENNSYLVANIA
HEADQUARTERS FOR SELECTIVE SERVICE
NORTHWEST OFFICE BUILDING
HARRISBURG

In Reply Refer to
k: 3.1-6
January 6, 1944

Mr. A. Groetzinger — CHAIRMAN
Local Board No. 26 — City of Pittsburgh
Perry High School
Pittsburgh, Pennsylvania

Re: THEODORE MARTIN SUNAL — Order No. 820

Dear Mr. Groetzinger:

This will acknowledge receipt of your letter of January 4, 1944, with respect to the above registrant.

Now that this registrant has been released on parole, and claims that he is acting in a ministerial capacity, it will be appropriate for you to consider his claim to a IV-D classification. If you believe that his activities are such that a IV-D classification is warranted, you should reopen his classification and advise him. If you do not believe he is entitled to a IV-D classification, you should advise him by letter that the facts submitted by him do not warrant a reopening of his case, and place a copy of such letter in his file.

In the latter event, your board cannot proceed with the assignment of this registrant to Civilian Public Service Camp unless his parole is suspended. If you wish to make a request for the suspension of his parole, I suggest you address a letter to the Attorney-General of the United States making such request, and forwarding it to this Headquarters for transmission to the Attorney General.

I may say, however, upon the basis of our past experience, that we do not believe it likely that the Attorney General will suspend this registrant's parole to permit his assignment to Civilian Public Service Camp. In the event

he declines to suspend parole for such purpose, the registrant should then be placed in Class IV-F. When the registrant's parole expires, however, his classification can then be reopened, and if you believe IV-E or I-A to be the appropriate classification, you may place the registrant in such classification and proceed with the processing of his case.

For the State Director:
Seymour Sheriff
SEYMOUR SHERIFF
Legal Advisor

JAN 7 '44

Probation Officer Walter J. Meyer.
Mr. O'Bryan. Apr. —44

SELECTIVE SERVICE SYSTEM
Local Board No. 26 32
Pittsburgh City 703
026

Perry High School
Pittsburgh, Pa.
(Stamp of Local Board)

Theodore Sunal Order No.

Appeared before the Board Members May 26, 1944 to advise he started to work at George Maier Garage, Lower Termon Avenue, N. S. Pittsburgh sometime in January 1944, *approximately 4 hours daily* 8:00 to 12:00 AM

Duties - -repairs, automotive service.

He does not consider this a job, but a means of earning his daily bread. The remainder of the day is devoted to the ministry; gives approximately 150 hours per month.

May 26, 1944.
Registrant refused to sign. Windhorst

Order No. 820
R. D. 1 Evans City Pa
May 26, 1944

Local Board No 26
Perrysville High School
Members of the Local Board

Having received your classification card of May 20, 1944 (postmarked) I hereby make formal request to have a hearing before you to present evidence for reclassification from the card's 1-A to that of a Minister of Religion as provided by the Selective Service Regulations and Rules, in behalf of myself a Jehovah's Witness

This request being made at the local board headquarters I kindly ask your kindest consideration I remain,

Respectfully yours
Theodore Sunal
THEODORE SUNAL

This written request left at office
by registrant on Friday evening 5/26/44
in place of attached Notice of Employment
typed by Board Clerk.

SELECTIVE SERVICE SYSTEM

Local Board No. 26 32

Pittsburgh City 703

X 026

Perry High School

Pittsburgh, Pa.

(Stamp of Local Board)

June 7, 1944

Theodore Martin Sunal

R. D. #1

Evans City, Pa.

Dear Sir: Order No. 820

You are requested to appear before the Members of this Local Board on Friday evening, June 9th, 1944, office hours from 7:30 P. M. to 9:30 P. M.

Yours very truly,

Local Board #26, Pittsburgh

A. Groetzinger

A. GROETZINGER

Chairman

H

Received by Board
Local Board No. 26 32
Pittsburgh City 703
Members
JUN 9- 1944 026
Perry High School
Pittsburgh, Pa.
Local Board No. 26 32
Pittsburgh City 703
JUN 13 1944 026
Received by Clerk.
Perry High School
Pittsburgh, Pa,

Local Board #26
Pittsburgh, Pa.
Re: Theodore Sunal Order no. 820
Gentlemen,

I am writing in regards to one Theodore Sunal of the Allegheny Company of Jehovah's Witnesses. Neither Theodore Sunal or anyone else asked me to write in his behalf but, having heard that he has been classified 1-A causes me to write this that he may be properly reclassified.

This is to inform you that I have known Theodore for at least eight (8) years, and that he has been and is actively engaged in preaching the Gospel of God's Kingdom. That his duties are manifold, particularily commissioned to go from house to house, conducting Bible Studies in the homes of persons of good-will, and as such he has ever since devoted most of his time as that of an able Minister of "religion".

That I have gained much inspiration and knowledge and understanding from his services conducted at the meeting place of Jehovah's Witnesses. That he conducts himself in his personal affairs as that of an able Minister, and that his habits are excellent. That many my freinds also consider Theodore an ordained minister of religion.

By properly classifing Theodore Sunal as a minister we shall indeed be grateful, and that he will be able to continue in the ministry.

Respectfully submitted;
CHARLES MOTRENEC
Charles Motrenec

Sworn to and subscribed before me,
this 1st day of
June, A. D. 1944
CHARLES D. STAHL [SEAL]
CHARLES D. STAHL, ALDERMAN
MY COMMISSION EXPIRES
JANUARY 1, 1946

Pittsburgh Pa. May 31, 1944

Members of Local Board No. 26

This testimonial is written in behalf of Mr. Theodore Sunal whom I recognize as a sincere minister of Jehovah's witnesses.

I have known him since Dec. 1943. I am crippled and he has visited me in my home each week for study of the Bible which I enjoyed and always looked forward to. I myself have four sons in the army and practally alone. My desire is that he be deferred to continue his good work.

Kindly
Mrs. Ella Kemper
1918 Irwin Ave
Pgh. Pa

June 5, 1944
1222 Palo Alto St.
N. S Pittsburgh
Penn

I. Mrs Alice Corbin make this statement to you members of the Draft Board in behalf of Theodore Sunal. Having known that he is an active Christian minister exercising his constitutional right to preach the Holy Bible to all men. Having known of his activities in our locality for over a period of five years or more, I can speak as to his Christian Citizenship activities.

Thanking you for any consideration shown I remain

MRS ALICE J CORBIN
Mrs Alice J Corbin

Sworn to and subscribed before me
this 5 day of
June, A. D. 1944
Agnes Stahl [SEAL]
AGNES STAHL, Notary Public
MY COMMISSION EXPIRES
JANUARY 5, 1947

Local Board No. 26 32
Pittsburgh City 703
JUN 15 1944 026
Perry High School
Pittsburgh, Pa.

To whom it may concern:

I, the undersigned do hereby declare that I have known Theodore Sunal for the past nine years and recognize him as an ordained minister. He is now serving as a pioneer with the Watch Tower Bible and Tract Society. I also wish to testify to his honesty and sincerety as a minister of the gospel.

Mrs. Sarah Haley

State of Pennsylvania,
County of Allegheny.
Subscribed and sworn to this 31 st day of May A. D. 1944.
Eugene Mehrlich
EUGENE MEHRLICH, N. P.
MY COMMISSION EXPIRES
JANUARY 5th 1947
Local Board No. 26 32
Pittsburgh City 703
JUN 9- 1944 026
Perry High School
Pittsburgh, Pa.
Received by Board Members.

Local Board No. 26 32
Pittsburgh City 703
JUN 13 1944 026
Perry High School
Pittsburgh, Pa.
Received by Clerk

Local Board # 26
Pittsburgh, Pa
June 2, 1944

Gentlemen,

Jehovah God over all the earth, now has a work to be performed amongst the people.

Theodore Sunal in whose behalf I am writing this is a personal acquaintance of mine, and have known him more than ten years. Theodore is recognized by myself as a true minister of Christianity, a term thoroughly misconstrued in collaborating it with religion. Theodore directed a well organized and systematic study of the Scriptures in my home for more than a year, and that before the selective service act was passed, and now know- of Theodore's devotion to "the ministry", his duties have increased and expanded.

In his new capacity as a full-time minister enveloping a greater dissemination of "the Kingdom message" I am heartily in accord with and for one am proud of him, and will aid him to the fullest extent.

Theodore's ministry service may seem strange to you as the Holy Scriptures foretold (see Isaiah 28:21), but I implore of you to let the very Scriptures also be your guide in this matter as did Gamaliel wisely say "And now I say unto you, Refrain from these men, and let them alone; for if this counsel or this work be of men, it will come to

nought; But if it be of God, ye cannot overthrow it; lest haply ye be found even to fight against God." Acts 5:38, 39.

Sincerily submitted,

ELIZABETH LENNOX
Mrs Elizabeth Lennox
1203 Resaca place
Pittsburgh, Pa.

Harry M. Davies
HARRY M. DAVIES, Notary Public
MY COMMISSION EXPIRES
MARCH 2, 1945

Local Board No. 26 32
Pittsburgh City 703
JUN 9- 1944 026
Perry High School
Pittsburgh, Pa.
Received by Board
Members

Local Board No. 26 32
Pittsburgh City 703
JUN 13 1944 026
Perry High School
Pittsburgh, Pa.
Received by Clerk

R. D. #1 Evans City
Pennsylvania
May 29, 1944

Draft Board # 26
Pittsburgh, Pa.

Re: Theodore Sunal Order No. 820

Gentlemen:

We the undersigned have made Theodore Sunal's acquaintance by virtue of a door to door visit on his part. We have now known Theodore for four months and have invited him back for further discussions on "the Bible". He is ably qualified as a preacher for Jehovah's witnesses and a direct representative of the Watch Tower Bible and Tract Society.

(Signed) Karl L Patterson 1421 Page St Pgh
Mrs. Mabel Patterson.

Received by Board Members
Local Board No. 26 32
Pittsburgh City 703
JUN 9- 1944 026
Perry High School
Pittsburgh, Pa.

Local Board No. 26 32
Pittsburgh City 703
JUN 13 1944 026
Perry High School
Pittsburgh, Pa.
Received by Clerk

May 31, 1944

TO WHOM IT MAY CONCERN:

This is to certify that for about ten years I have known Theodore Sunal to be a devout student of the Scriptures. He assumed the duties and requirements of a minister of the Gospel and is now an ordained minister—recognized as such—to which work he devotes his life. He carries on his ministering under the direct supervision of the Watchtower Bible and Tract Society, Inc. which is a legally recognized organization for Bible instruction. I have attended meetings in which he had an active part and have heard Bible lectures which were prepared and delivered by him and have no doubt as to his sincerity and competence.

Very truly yours,

DAVID GARVIN JR.
David Garvin, Jr.
1314 Arch St.
NS Pittsburgh, Pa.

Sworn and subscribed to before me
this 3rd day of June A. D. 1944
Raymond E. Switzer
RAYMOND E. SWITZER, Notary Public
My Commission Expires
January 5th, 1947

Received by Board Members
Local Board No. 26 32
Pittsburgh City 703
JUN 9- 1944 026
Perry High School
Pittsburgh, Pa.

Local Board No. 26 32
Pittsburgh City 703
JUN 13 1944 026
Perry High School
Pittsburgh, Pa.
Received by Clerk

KINGDOM HALL REPRESENTING
RODGER'S BUILDING THE THEOCRACY
ALLEGHENY-UNIT OF PITTSBURGH COMPANY OF
JEHOVAH'S WITNESSES
111 FEDERAL STREET PITTSBURGH 12, PA.
FAIRFAX 6776

May 29, 1944

TO WHOM IT MAY CONCERN:

This is to certify that Theodore Martin Sunal is a regular and duly ordained Minister of God serving as such as a Pioneer under the jurisdiction of the Watch Tower Bible & Tract Society of Brooklyn, New York. He has been serving in such capacity since January, 1944. Prior to that time, he has been associated with the Allegheny Unit of Pittsburgh Company of Jehovah's Witnesses and has been engaged regularly as a duly ordained Minister since the year 1935. He was immersed (baptized) in May, 1935. He is thoroughly qualified to conduct private and public Bible Studies and takes an active part in the public Bible Studies conducted at our headquarters in the Rodger's Building.

I know him personally and can confidently state that he is a sincere and conscientious preacher of the Word of God, the Bible.

Yours very truly,
JOSEPH J. PETTI
Joseph J. Petti, Unit Servant
(Minister in Charge)

STATE OF PENNSYLVANIA,
COUNTY OF ALLEGHENY,
Subscribed and sworn to before me this 29th day of May 1944.
N M Gaertner
Notary Public
N. M. GAERTNER, Notary Public
MY COMMISSION EXPIRES
MARCH 30, 1945

Received by Board Members
Local Board No. 26 32
Pittsburgh City 703
JUN 9- 1944 026
Perry High School
Pittsburgh, Pa.
Received by Clerk
Local Board No. 26 32
Pittsburgh City 703
JUN 13 1944 026
Perry High School
Pittsburgh, Pa.

R. D. Evans City, Pa.
May 31, 1944

Local Board No. 26
Perrysville High School
Pittsburgh, Pa.

Members of the Board: Re: Theodore Sunal No. 820

Calling upon us the undersigned, once each week for the past three months is a person in whose behalf this is written. It is Theodore Sunal an authorized representative and Minister of Jehovah's witnesses, and as such we approve and recognize.

In our Home we have now been shown how to use the HOLY BIBLE. We have now begun a systematic study of it in a humble fashion. "Children" is our text and all related Bible passages are thoroughly searched and studied jointly. We are much interested in "the Kingdom" as taught in the Lord's prayer and are now being taught without cost, precious truths concerning it. We pray your good office to realize our position of this essential and needed help as a congregation.

J. Clifford Dowdell 1921 Irwin Ave. Pagh (12) Ages 17
Ila Mae Johnson 1819 Irwin Ave Pgh (12) Pa. " 23
Delores Richardson 1819 Irwin Ave Pgh " 8
Mary Richardson 1819 Irwin Ave pah " 9
Louis Richardson 1819 Irwin Ave Pgh 12 Age 15
Local Board No. 26 32
Pittsburgh City 703
JUN 9- 1944 026
Perry High School
Pittsburgh, Pa.
Received by Board Members.

Local Board No. 26 32
Pittsburgh City 703
JUN 13 1944 026
Perry High School
Pittsburgh, Pa.
Received by Clerk

We the undersigned know and are acquainted with Theodore Sunal, recognizing him as an active "regular minister of religion". (S.S.R. 622.44) That Theodore preaches and teaches the principles of Christianity under the direction of the recognized Watch Tower Bible and Tract Society as a pioneer, full-time minister.

Howard Ralph Scott 603 Martindale St North Side
June Hunter 4519 Chatsworth St Pgh. Pa.
Anna Stahl 1334 Federal St U S Pgh Pa
Anna Tzans Seisman St U S Pgh Pa
Wilma Adams 518 Armandale St N. S Pgh Pa.
Carl F Broge R D #1 Glenshaw Pa
Joseph J. Petti RD 4, Box 402, Millvale, Penna.
Henry Hundertmark 132 Washington St. Etna Pa.
Ray Hunter 4519 Chatsworth St 7 Pgh, Pa.
Grace L. Petti, R. D. 4, Box 402, Millville, Pa.
Margaret Morris, Brunswick Hotel, Irwin, Pa.
Ruth E. Porr, 225 Sample St., Millvale, Pa.
Augusta H. Doerfler Box 601 Anderson Rd. R. 8, Pittsburgh Pa.
Mae A. Good 28 Vilsack St., Etna, Pa.
David R. Groge R D 4, Glenshaw, Pa.
Harold Dahl 1315 Western Ave. N. S. Pgh. Pa.
John Steen Dahl 1315 Western Ave Pgh. 12, Pa.
Ella Shaffer 69 Melrose Ave. N. S. Pittsburgh, Pa
Mary E. Wettach, 1716 Harpster St. N. S. Pitts. Pa.
Frank E. Doerfler Route #8 Pittsburgh (5) Pa.
Margaret M Morris 1117 Lamont St., N. S. Pgh. Pa.

Dorothy G. Meyer 514 Armandale St. N. S. Pgh. (12) Pa.
Ida G. Malone 2951 N. Charles St. N. S., Pgh. 14, Pa.
Margaret Broge R. D. #1 Glenshaw Pa.
Jane Hundertmark 132 Washington St. Etna Pa
Frederic Blaser R. D. #1 Glenshaw, Penna.
Nicholas Pochvatilla 104 Sampsonia St. N. S. Pgh. Pa.
Esther Blaser R D #1 Glenshaw Pa.
Anne M. S. Young, 827 Evergreen Ave Pittsburgh, 9, Pa.
Edward G. Rose, 1013 Liverpool St. N. S. Pgh. (12) Pa.
Danna Velicoff 405 Chestnut St. N. S. Pittsburgh Pa.
Clifford E Robesh 1727 Warren St. N. S. Pgh. Pa (12)
Peter Kozub 1258 Spr Garden Ave N. S. Pgh. Pa.
Josephine Sunal 1325 Malden St. N. S. Pgh. Pa.
Phoebe Koetitz Kline Rd. Glenshaw, Pa.
Alma Fincke 1926 Manhattan St. N. S. Pgh. (12) Pa.
Duna Silurius 9 Magnet St N S Pgh Pa.
Thomas B Good 28 Vilsack St. Etna Pgh
Marjorie Davis 1202 Palo Alto St N. S. Pgh. Pa. (12)
Leona Willis 1921 Irwin Ave. N. S. Pgh. Pa.
Myrtle E. Puff 1923 Bader St N S Pgh 12, Pa.
Mabel I. Deemer Zelienople Penna R. D # 1
Mary Miller 945 Center av West Vin pa
Lydia J. Dorst 235 No. Balph Ave. Bellevue
Adele B Smith Valencia Pa
Gloria D. Smith Valencia, Pa.
Etta Vail Pyle Kline Rd. Glenshaw, Pa.
Cora E. Shakely Valencia Pa.
Minnie J. Wilson 235 No. Balph Ave Bellevue Pa.
Bertha Grant 156 No. Fremont St. Bellevue Pa.
Susan Wendell 1218 Woods Run Ave. N. S. Pgh. Pa.
Carrie A. Dorst 225 Sample St. Millvale Pa.
Robert M. Young 827 Evergreen Ave P'gh. 9, Pa.
William C Grant 156 N Fremont Ave Bellevue Pa.
W. S. Smith Valencia RD 2 Pa.
Elmer F Porr 225 Sample St Millvale Pa.

H. W. Dorst, 235 No. Balph Ave., Bellevue, Pa.
J. H. Grant 526 Semple Ave Avalon Pa.
S. K. Wandell 1218 Woods Run Ave N. S. Pgh, Pa.
Lillian Martin 2437 Spiral St. N. S. Pa.
Nellie Greiner 1217 Esplanade St.
Martin Klima 1707 Howard St.
Henry C. Meyer 514 Armandale St. NS Pittsburgh Pa.
Wilma Adams 514 Armandale St. Pitts Pa.
Ursula M. Serenco 1108 Crawford Ave., Duquesne, Pa.
Ethel R. Tokus R.D.#1 Zelienople, Pa.
George Serenco 1108 Crawford Ave., Duquesne, Pa.
Mrs U. C. Serenco 1108 Crawford Ave Duquesne, Pa.

Local Board No. 26 32
Pittsburgh City 703
JUN 15 1944 026
Perry High School
Pittsburgh, Pa.

June 22, 1944

TO WHOM IT MAY CONCERN:

I, the undersigned, testify that I know Theodore Sunal and that he is a minister of Jehovah and his witnesses.

That he regularly addresses meetings of Jehovah's witnesses. The average weekly attendance at the meetings is about 80 persons.

The Lord will reward any one who acts with kindness toward His people. In support of this statement please read the Book of Matthew chapter 10, verses 40 to 42.

Respectfully
Robert M. Young
827 Evergreen Avenue
Pittsburgh 9, Pa.
(Millvale)
ROBERT M. YOUNG

Sworn and subscribed to before me
this 22nd day of July 1944.
John W Bowen
JOHN W. BOWEN, N. P.
MY COMMISSION EXPIRES
FEBRUARY 17th, 1946

Order No 820
Theodore Sunal
R D #1 Evans City, Pa.
July 1, 1944

City Local Board # 26
Pittsburgh, Pa.

Attention: Members

I, Theodore Sunal a registrant within your jurisdiction under the Selective Service and Training Act of 1940, hereby make request for appeal to Board of Appeals. I make appeal from Local Boards incorrect classification of 1-A dated and postmarked June 24, 1944.

Respectfully entreated,
Theodore Sunal

CS:TS
Attached herewith is a statement to Board of Appeal.

Order No. 820
Theodore M. Sunal
R D #1 Evans City, Pa.
July 3, 1944

Board of Appeal
Gentlemen:

Attached herewith is a copy of my notice of appeal that has been filed with my local board.

I, Theodore Sunal, am a registrant with city Local Board No. 26, Pittsburgh, Pennsylvania. I hereby make appeal to you members of the Board of Appeals to rectify and properly adjust my classification. My appeal is from the given 1-A of the Local Board to that of a Minister.

It is regulation 627.12 of the Selective Training Act that extends me this privilege of bringing to your kindest attention information that is in my file which I believe has not received sufficient weight or missed in oversight by the Local Board.

I, Theodore Sunal, registrant, claim exemption as a regular or duly ordained minister of Jehovah's Witnesses. My file contains detailed record for such claim in light of the stipulations required of Opinion No. 14 (amended) National Headquarters, Selective Service and signed by Lewis B Hershey Director.

It was in 1941 that this same board acted arbitrarily and ignored the proof of my ministerial status which eventually lead to a false indictment and a two year sentence in a Federal prison. This sentence having been served and now completely released since December 6, 1943. I immediately chose to re-enter the field of ministry in a more responsible position and thus became directly appointed by the Watch Tower Bible and Tract Society as a full-time publisher. This appointment and authorization as such are in my file photostated.

To acquaint you with the ridiculity of the Local Board in its arbitrary actions let me cite one small example. Mr. Groetzinger knowing my age as 27½ said that 'if I would now be fully employed at my former place of employ (Bendix-Westinghouse) as a mechanic under a new ruling I could be deferred'. The agent of appeal Mr. Schmidt sitting in at the last minutes of the hearing suggested that perhaps I would now go to a 'conscientious objectors' camp if given 4-E. Now then, accept a nice high paying lucrative secular job or retire to an objectors camp. Why are the signed and notarized affidavits of the nineteen (19) persons attesting to my minister's assignment not considered? The sworn statement of my local elder J. J. Petti, proving my consecration and ordination as of early 1935 and my present platform assignments surely are worthy of consideration. Then too the petition form of some sixty-eight (68) associated members of the congregation endorsing my activity in presenting the spiritual foods so desperately needed in this day of woe!! These obligations of

the ministry acrue to more than one hundred fifty hours (150) per month since my prison release. The few early morning hours of five and six days a week I earn honestly my daily bread in the toils of labor and sweat. See affidavit of Mr. G. Maier my employer. This generally averages about one hundred twenty hours a month. On top of all this I squeeze in all possible time helping my aging father and mother maintain their totering farm in Butler county.

Be it not lightly considered that my first and chiefest duty is unto the Almighty God above. In him I implicitly trust and fear alone. He created the earth and every good and perfect thing in it. He knows the hearts of all humankind, kindly read 1 Chronicles 28 verse 9. This nation is on record and claims to be a Christian country. If America and its democratic allies cleverly avoided bombing Vatican City and Rome in its recent military operations that it might not be charged with "matricide" as declared by Pope Pacelli, then I appeal to you as a fighter on the home front that my God given responsibilities be not trampled underfoot. It is written at Hebrews 10: 31 "It is a fearful thing to fall into the hands of the living God".

Sincerely,

Theodore Sunal

Order No. 820
Local Board #26
Perry High School
Pittsburgh, Pa.
July 28, 1944

Board of Appeal
Allegheny County, Pennsylvania

Gentlemen: Re: Theodore Sunal

This letter comes to you as an addition to my letter of appeal to you dated July 3, 1944.

This comes as a self-prompt, to write you the results of my "pre-induction physical fitness examination" this 28th. day of July 1944 at the induction center, Old Post Office Bldg., Pgh., Pa.

Courtesy by army personnel and genuine precision was observed in the near flawless selection of men for the armed forces. I too, am confident that my 'physical examination' proved my "fitness for armed services favorable, but other conditions find my report as an emphatic rejection. It is upon this I now wish to dwell briefly that you may be assured of my incorrect classification of 1-A.

The final office found me reporting a former arrest. Detailed account was given of my previous confliction with local board authorities, and how eventually in the U. S. Federal Court of May 1942 I was found guilty of a "misdemeanor, felony, willingly and knowingly failed to report to work in a Civilian Public Service Camp." This was the trumped charge and the phrasing of the indictment by which the jury rendered the verdict. Yes, I have served "time", a sentence of two years and paid the penalty for that crime. I have just been completely released this current year's month of May.

Now then, the officer in charge at this certain department and office to-day made efforts to seduce an answer as to what I would do this time. My only and reasonable reply was that of my ministerial training quoting the words

of Peter and other apostles of Jesus Christ under parallel circumstances, "We ought to obey God rather than men." (Acts 5:29) Adding that I will continue always to preach as ordained, "the gospel of the kingdom . . . In all the world for a witness unto all nations;" (Matthew 24:14), and to comfort all that mourn. To this he sarcastically ejaculated, 'Well for five or ten years you will land where you will not be able to ever preach about God's righteous kingdom.'

I haven't any criminal inclinations gentlemen, the same surely can be verified in the original report and investigation by the F.B.I. Their papers are within my file, and may be of aid if referred to. Said Mr. W. Urich, Supervisor of Parole, Washington, D.C. In a letter at hand, "It is a source of satisfaction to the Board of Parole and to this office that you have completed your Conditional Release successfully and it is hoped that you will continue to maintain this good record." This I can do sirs, with your assistance. I have continually kept this bureau in the Dept. of Justice informed of my active duty as a full-time (pioneer) —Minister of Jehovah's witnesses.

I hereby appeal to you from Local Board's classification of 1-A to that of a "minister of Religion". In all sincerity I know refer you to my file and implore of you to compare it with the minutest detail of Secs. 5 (d) 622.44 and Opinion No. 14 (amended), Vol. III Selective Service Regulations. You will find at least twenty personal affidavits, signatures of more than sixty-five more persons and other vital documentary evidence attesting to my commission as a registrant claiming exemption as a regular and duly ordained minister.

Respectfully yours,

Theodore M. Sunal

P.S. All testimonials, affidavits, statements etc, referred to in this letter have all been attained and compiled since my complete prison release as of May 1944 and compose my new file, and this upon the request of the local board.

September 27, 1944

TO WHOM IT MAY CONCERN:

This is to certify that Theodore M. Sunal, one of Jehovah's witnesses, has been associated with the Watchtower Bible and Tract Society, Inc., according to our records, since the year 1935.

He was baptized in the year 1935, and was appointed pioneer minister and direct representative of this organization to perform missionary and evangelistic service in organizing and establishing churches and generally preaching the Gospel of the Kingdom of God in definitely assigned territory on January 1, 1944.

Mr. Sunal's entire time is devoted to missionary work. He has declared himself to be a follower of Christ Jesus and wholly consecrated to do the will of Almighty God. He has taken a course of study in the Bible and Bible helps prescribed by this Society and has shown himself apt to preach and teach "this Gospel of the Kingdom".—Matthew 24:14.

He has the Scriptural ordination to preach "this Gospel of the Kingdom". (Isaiah 61:1, 2; Isaiah 52:7) He is, therefore, declared by this Society a duly ordained minister of the Gospel and is authorized to represent this Society and preach "this Gospel of the Kingdom", proclaiming the name of Jehovah God and Christ Jesus, His King.

(signature) Watchtower B. & T. Society, Inc.
(signed) T J Sullivan
Superintendent of Evangelists and Ministers

Subscribed and sworn to before me
this 27th day of September, 1944.
(signed) William K Jackson
NOTARY PUBLIC Kings County
Kings Co. Clk's No. 119 Reg. No. 62-J-5
Commission Expires March 30, 1945

SELECTIVE SERVICE SYSTEM
Local Board No. 26 32
Pittsburgh City 703
026

Perry High School
Pittsburgh, Pa.
(Stamp of Local Board)
August 28, 1944.

8-4-44

Appeal Board B,
Area 9,
1703 Law & Finance Bldg.,
Pittsburgh, Pa.

RE: THEODORE M. SUNAL
Order No. 820.

Gentlemen:—

This in an appeal by the registrant from the Board's refusal to grant him deferment on the grounds that he is a Minister. This case has had considerable notoriety, when it was previously up for discussion, registrant was refused a deferment on the grounds of being a Minister and was classed as a conscientious objector. He refused to report for service in the conscientious objectors' camp; he was later tried and convicted for this refusal and sentenced by the United States Court. Upon his release he was reclassified into 1-A.

Registrant has enclosed in this file, his letter setting forth that he is a minister, his experience as such and some affidavits and signatures of various persons certifying that he is a Minister in accordance with the Doctrines of Jehovah's Witnesses.

These affidavits and letters are self-explanatory and are

submitted to you at his request hoping that he will be reclassified.

Respectfully submitted,
Arthur F. Schmidt
Government Appeal Agent for
Local Board #26.

AFS:b
cc—Local Board #26.

January 27, 1942
August 31, 1944
820
26, City of Pittsburgh

Theodore Martin Sunal

STATEMENT OF FACTS:

BOARD B placed registrant in 4-E on January 27, 1942.

Registrant requests 4-D, Minister of Jehovah's Witnesses.

27 (11/8/16), single, 4 years grade school, 4 years high school.

As of January 1941, automotive carburetor and electrical mechanic at Bendix Westinghouse Automotive Air Brake Company, 6 years' experience, $25 weekly.

In July 1941, after he had been placed in I-A by the Local Board, registrant appealed for a 4-D. The file was sent to the Department of Justice—they recommended a 4-E classification in January 1942. Board B so classified registrant in January 1942.

He failed to report to a work camp and was sentenced in Federal Court at Pittsburgh on 5/19/42 to two years at Mill Point, Va., and was fined $100 and costs. The sentence was to terminate in May 1944. He was released from the institution in December 1943, but was still under the jurisdiction of the Federal Court.

Registrant is employed by George J. Maier, General Automobile Repairman, as part time mechanic since Jan-

uary 1944. On 5/31/44 employer stated registrant had proved satisfactory to him.

Registrant has been a minister since 1935. He claims he devotes 150 hours a week to the ministry which does not include his appearance once a week before the congregated group of the Allegheny Unit of Jehovah's Witnesses; it also does not include time spent in preparing to meet the audience.

LBA: I-A 5/19/44—GENERAL SERVICE

ABA: ———————— DATE: ————————

COMMONWEALTH OF PENNSYLVANIA

HEADQUARTERS FOR SELECTIVE SERVICE

NORTHWEST OFFICE BUILDING

HARRISBURG

In reply refer to
k-44.9-26
September 26, 1944

Mr. Theodore M. Sunal

R. D. #1

Evans City, Pennsylvania

Dear Sir:

Further referring to my letter of September 23, 1944, I have now completed my review of your case.

After a careful review of your entire file, no further action on our part is deemed justified in your case.

For the State Director:
Seymour Sheriff
SEYMOUR SHERIFF
Legal Advisor

COMMONWEALTH OF PENNSYLVANIA

HEADQUARTERS FOR SELECTIVE SERVICE

NORTHWEST OFFICE BUILDING

HARRISBURG

In reply refer to
k:79.10-6
October 6, 1944

Mr. Theodore M. Sunal
Route 1
Evans City, Pennsylvania
Dear Sir:

Your letter of September 21, 1944 to General Hershey has been referred to this Headquarters for attention and reply.

As I wrote you on September 26, 1944, your entire file has been carefully reviewed at this Headquarters and no further action is contemplated in your case.

For the State Director:
Seymour Sheriff
SEYMOUR SHERIFF
Legal Adv[redacted]

ARMY SERVICE FORCES
THIRD SERVICE COMMAND
Pittsburgh Recruiting & Induction District
SMITHFIELD STREET & FOURTH AVENUE
Pittsburgh 19, Pennsylvania

201-Sunal, Theodore Martin 25 October 1944.

SUBJECT: Report of refusal of Registrant to be Inducted.
TO: United States District Attorney, Pittsburgh, Pa.

1. Registrant Theodore Martin Sunal, Order No. 820, delivered to this Armed Force Induction Station, 25 October 1944, for Induction, by Local Board No. 26, Perry High School Building, Pittsburgh, Pa., refused to take the oath of induction into the Army of the United States.

2. This registrant was prepared for Induction in the manner prescribed in regulations (Procurement Memorandum No. 49, Hq Third Service Command, Baltimore, Md.,) and refused three (3) separate times to take the necessary action to complete induction. He was informed that such action on his part constituted a felony under the provisions of the Selective Training and Service Act of 1940, as amended. He was further informed that conviction of such an offense under civil proceedings would subject him to punished by imprisonment for not more than 5 years or a fine of not more than $10,000, or both. He was again informed of imminence of induction and again refused.

3. This registrant refused to sign any records and also refused to sign the statement desired, when practicable as follows: "I refuse to be inducted into the Army of the United States".

4. The registrant was ordered to leave the military premises and was not furnished transportation in any form by the Army.

5. The officer of this command who attempted to administer induction into the Army of the United States of Theodore Martin Sunal, was Major Earl G. Kennedy,

Assistant Recording & Induction Officer. Witnesses were: Colonel Joseph N. Marx, District Recruiting & Induction Officer and 1st Lieutenant Seymour Garfinkel, Assistant Recruiting & Induction Officer, and Mr. C. V. Holmes, Reemployment Commiteeman, Local Board No. 26, Perry High School, Pittsburgh, Pa.

Joseph N Marx
JOSEPH N. MARX,
Lt. Colonel, Cavalry,
Dist. R&I Officer

Confirmation copy sent to—
State Director, Selective Service, Harrisburg, Pa.
Local Board No. 26, Pittsburgh, Pa.

Local Board No. 26 32
Pittsburgh City 703
OCT 2- 1944 026
Perry High School
Pittsburgh, Pa.

This statement written October 25, 1944
N. M. Pollock, Clerk L.B. #26, Pgh.

Registrant Theodore Martin Sunal Order No. 820

Classification of 1-A was affirmed by Appeal Board B, Area 9, Pittsburgh, Pa. August 31, 1944. File was received in Local Board office Sept. 9th, 1944. DSS Form 57 showing Appeal Board decision was mailed to registrant Sept. 12, 1944. Card signed by Mr. A. Windhorst.

DSS Form 150 Notice to Appeal For Induction was mailed to registrant dated Oct. 7, 1944; to appear at Local Board Office Oct. 25, 1944 at 7:00 AM to be delivered to the Pittsburgh Induction Station for induction into armed service.

On October 19th, 1944 (six days prior to date of induction) a letter was received from the registrant, enclosing "photostat copy of my physical appointment and recognition, as a preacher and Minister of the legal International organization, the Watchtower Bible and Tract Society, Brooklyn, New York." According to regulations 626.2 the information submitted by the registrant did not warrant a re-opening of classification, but to avoid any possibility of a charge of erroneous induction, the file was submitted to Selective Service Headquarters at Harrisburg for a legal opinion. This file was returned to Local Board, being received the morning of October 24, 1944, with a letter from Seymour Sheriff, Legal Advisor stating further action on their part would not be justified and it would be appropriate to proceed with the registrant's induction.

The registrant's home address is given as R. D. #1, Evans City, Pa. making it difficult to communicate with him. The Clerk of the Board, Mrs. N. M. Pollock, telephoned to his given place of employment, the George Maier Garage, 3634 Granada St. N. S. Pittsburgh Pa. and was advised by John H. Leasure that the registrant left their employ "two or three months ago". This fact was never reported to L.B. Office by the registrant.

The registrant appeared on the morning of October 25, 1944 and together with other selectees was delivered to the Induction Station by Mr. Chas. V. Holmes, reemployment Committeeman for the Local Board.

A Telephone call was received from the Induction Station, Pittsburgh, about 9:00 AM questioning the registrant's classification of 1-A. They believed him to be a conscientious objector. Mr. Chas. V. Holmes returned to the Induction Station with the complete file and Selective Service Manual of Regulations. A Military Court of Inquiry, consisting of five officers was held by Lt. Col. Marx. At this inquiry the registrant refused to be inducted and also refused to sign a statement to that effect, submitted by Lt. Col. Marx. The registrant requested Mr. Holmes to sign a statement written on Form 150 to the effect that the registrant had appeared for delivery. Mr. Holmes refused to do this since the registrant himself would not sign the statement submitted by the Court of Inquiry. The registrant was left in the custody of the Induction Station Officers.

Transcript of Proceedings

[EXCERPTS]

* * *

AFTERNOON SESSION, APRIL 4, 1946. 2:00 O'CLOCK

All parties present as heretofore noted and proceedings continued as follows:

THE COURT: You may go ahead, now, Judge Given, with your argument.

MR. GIVEN: (Further argument.)

If I understand Mr. Covington correctly, it is conceded that the general rule is that habeas corpus will not apply where an appeal should have been taken, or was available.

Therefore, it only remains to decide whether or not there would be an exception in this particular type of case, whether or not habeas corpus here would lie and constitute an exception to the general rule.

Now, I have prepared a memorandum as to the general rule applied to late cases (United States Supreme Court) with reference to that question. Frankly, I have not found any case I believe contrary to that rule or that makes an exception that would be applicable to this particular type of case.

THE COURT: What about Mr. Covington's analogy between this case and a case, for example, where a man is accused of having committed a murder and is not permitted to introduce any evidence of self-defense?

MR. GIVEN: Your Honor, I think that the question there is, on that type of case, that the Court ousts its jurisdiction when it fails to grant the defendant his constitutional right, which is granted to him by the Constitution. Now, that is probably illustrated more clearly where the defendant is denied the right of attorney.

THE COURT: Well, we can see that those cases are exceptions to the rule because the Constitution, itself, in

its terms gives him certain rights and if those rights are denied him at the trial, furnishes the basis for writ of habeas corpus after conviction but the right, here, is based on denial of due process and Mr. Covington argues that it is analogous to a case where the charge is murder and the defendant wishes to introduce a defense of self-defense and the Court refuses to permit that defense to be made and instructs the jury that it cannot be made.

Now, the question is would that situation call for a writ of habeas corpus and if it does, what is the distinction between that and this case?

MR. GIVEN: In the first place, I would not concede a writ of habeas corpus would lie in that sort of case, because the Court has jurisdiction.

(Further argument.)

THE COURT: Isn't there a distinction between a ruling of a Court on the admissibility of evidence as to whether it is material to a certain defense, isn't there a difference between that and denying the defendant the right to make a defense, a defense that he says he wants to make and which is, if sustained, which is a defence?

MR. GIVEN: I can see a difference as far as procedure is concerned, but as far as result to the defendant is concerned, I see no difference. (Further argument.)

THE COURT: Well, I see this distinction, that if the right to make a defense is conceded, then the Court's act in either letting in or keeping out evidence as to that defense, could not be the foundation for a writ of habeas corpus because it would simply be an erroneous act of the Court in admitting or refusing evidence. Now, I am fairly clear on that, but as to whether the Court's act in refusing the right to make a defense, which is a valid defense, I will confess that I am not so sure about that.

MR. GIVEN: I have another case exactly on that point. (Further argument.)

MR. COVINGTON: (Further argument.)

THE COURT: Well, I am of the opinion to overrule the demurrer of the defendant in this case and to hear the case on its merits and I suggest that there could be and ought to be a stipulation of fact so as to avoid the necessity of having any hearing of witnesses on this application for habeas corpus.

MR. COVINGTON: Your Honor, I discussed this matter with Counsel this morning. We are not in diagreement as to any of the facts. I am sure that we can stipulate as to the facts and avoid the necessity of hearing evidence.

THE COURT: Well, can that be done right here and now?

MR. GIVEN: I think so, Your Honor.

MR. COVINGTON: I think so.

THE COURT: Then suppose we have a short recess and during recess, Counsel, see if you can get together a stipulation which may be incorporated in this record, read it to me and then I will proceed to determine—decide the case.

MR. COVINGTON: Yes, Your Honor.

(Short recess.)

THE COURT: All right, Gentlemen.

MR. GIVEN: I expect Your Honor wants the stipulation read?

THE COURT: Yes.

THE REPORTER: (Reads stipulation dictated by Counsel herein during the absence of the Court, at recess, as follows:—)

It is hereby stipulated that the petitioner and respondent are, respectively, citizens of the United States; that the petitioner is a resident citizen of the Commonwealth of Pennsylvania and the respondent is a resident citizen of the state of West Virginia.

It is further stipulated that the petitioner is being held by the respondent under and by virtue of an order, judgment and commitment issued by the United States District

Court for the Western District of Pennsylvania, on March 22, 1945, in Cause No. 11,894, Criminal, in said Court, based upon a verdict of a jury convicting the defendant of violating the Selective Training and Service Act of 1940 as amended by refusing to submit to induction as charged in the indictment.

The judgment and commitment is marked as Exhibit A and made a part of this stipulation.

The indictment is marked as Exhibit B and made a part of this stipulation.

It is further stipulated that this Cause was tried to the Court before a jury in the United States District Court for the Western District of Pennsylvania on March 22, 1945. That upon such trial, the defendant attempted to offer de novo evidence as to his activity, background and training as a minister and also upon the trial attempted to offer into evidence the entire Draft Board file, which is marked as Exhibit C and made a part of this stipulation.

Such evidence thus offered in behalf of the defendant as a defense to the indictment for the purpose of showing that the Draft Board exceeded its authority and acted illegally, was rejected by the Court, excluded on the ground that the trial Court was of the opinion that the jury could not inquire into the validity of the Draft Board proceedings and could not determine whether or not the petitioner was or was not a minister of religion within the meaning of the Act and Regulations.

Upon the trial, the Court charged the jury that in determining the guilt or innocence of the defendant under the indictment, that they could not consider whether or not the Draft Board acted illegally in classifying the petition or whether it exceeded its authority and that the question for the jury to determine was whether or not he unlawfully, willfully and knowingly failed and refused to submit to induction as alleged in the indictment.

The defendant objected and excepted to the rulings

of the Court in excluding the evidence and to the charge of the Court.

It is further stipulated that there was no appeal taken to the United States Circuit Court of Appeals for the Third Circuit from the judgment and commitment rendered on March 22, 1945, and that the defendant is now incarcerated at the Federal Prison Camp at Mill Point, West Virginia, pursuant to the judgment and commitment, which is within the jurisdiction of this Court.

THE COURT: Did the Court deny, absolutely, the right of the defendant to make the defense that he tried to make?

Now, if the Court let in some evidence and excluded other evidence on that defense, it might be said that his right was not denied but I think the stipulation ought to be clear, if it is a fact that the trial Court refused all evidence offered by the defendant in that case on the question of arbitrariness of the Draft Board.

MR. COVINGTON: We can so stipulate, no other evidence of any kind or character was received by the Court on the trial of this case, with reference to the illegality, arbitrary, capricious action or whether or not it exceeded its authority and acted illegally.

MR. GIVEN: I do want to explain this to the Court. We have been unable to obtain a transcript of this trial. We don't know what did happen. We thought Mr. Covington would have a transcript, so we are at a loss to know what did happen, though I think we are safe in assuming it was handled as other cases were handled and tried, after the Falbo case, Falbo decision. Under that, I believe the Courts refused all evidence relative to ministerial activities. That is really what we intended—what I thought the stipulation did cover.

* * *

THE COURT: According to your theory of it, then, the Court has the duty now, after having entertained this petition, to look at the file and if it appears from the file

that there is no evidence submitted to the Draft Board—that there was no evidence submitted to the Draft Board, then it follows the Judge Schoonmaker, by reason of the idea that we all entertained then (following the Falbo Case), Judge Schoonmaker denied the introduction of that evidence, whereas he should have permitted it to be introduced and then should have directed a verdict of acquittal? I mean, if there is no evidence in there that the Draft Board had the right to consider?

MR. GIVEN: That is correct, and if there is no evidence in the record, Judge Schoonmaker, I would say, made error in this case and the Draft Board order directing this petitioner to report was illegal and void and this writ should issue, if that situation is found to be correct.

THE COURT: Well, I think that I will agree with you in the position that you take on that because I feel that if, in fact, this file shows that there is evidence which was subject to consideration by the Draft Board, that then the defendant is bound by that because he introduced it or asked to introduce it and if the Court denied the introduction of that kind of evidence, I don't believe that the Court committed any error even under the Smith and Estep Cases.

So I think that what remains to be done now is for Counsel to point out their respective contentions as to what this file does disclose.

* * * *

THE COURT: Let me ask Judge Given: Do you conceive, Judge Given, that if this man was what is classified as a Pioneer of Jehovah's Witnesses, working at that 150 hours in a month, that that, prima facie, established his claim to be a minister?

MR. GIVEN: No, Your Honor, as I understand, being a pioneer is not synonymous with being a minister. It is true, they all claim ministerial classifications but a lot of those individuals, who don't come within the definition of a

regular minister or of an ordained minister, as we understand it.

THE COURT: Well, what I am speaking about is this: If there is no evidence in the file that he did any outside work at all, but there is evidence that he worked 150 hours a month as a "pioneer" and that he thereby claims to be a minister—does that, in your opinion, establish a prima facie case of being a minister?

MR. GIVEN: I think probably nothing else in the record that would, prima facie.

THE COURT: Now, that being the case, is there anything in the file as far as currently—is there anything there other than the fact he worked three hours a day at secular employment?

MR. GIVEN: The Board is not confined to the last evidence offered, it must take all the evidence offered before the Board. (Further argument.)

THE COURT: After all, isn't the only basis they have that he is now working 3 hours a day at secular employment—what other evidence is there that this prima facie case of minister, does not exist?

MR. GIVEN: At this time?

THE COURT: At the time he was classified 1 A, what other evidence did the Board have than the fact he was working 3 hours a day at secular employment?

MR. GIVEN: They had the answer to the questionaire in which he stated he was not a minister.

THE COURT: As Mr. Covington pointed out, there is no reason why a man's status may not change.

MR. GIVEN: That is true, and I think that is probably a correct position as to that.

THE COURT: Did they have any evidence to show his status had not changed?

MR. GIVEN: I say, Your Honor, the Board must take all the evidence in this file, not only evidence offered last,

they must take all the evidence. (Further argument.)

THE COURT: Now, if that argument is correct, a man might be, at the time he registers and at the time he is first classified, he might be a layman and later on, he might become a duly ordained minister, or as Mr. Covington said, might become a Judge. Now, he files with the Board evidence prima facie that he is a minister, or that he is a judge. According to your argument, the Board, without any other evidence being in the file at all, would be justified or at least, it would be acting legally, if it went back and reviewed the whole file and said "We don't believe that you are a minister or a judge, therefore we will continue your classification in 1 A"?

MR. GIVEN: I don't think that would be a correct conclusion, because here he doesn't claim to have changed from one exemption to another. (Further argument.) He does claim he was a minister, all the time, even under his first questionaire he claimed he was a conscientious objector —in a number of statements in here he submits, himself, he was a minister 'way back prior to the time of the war.

(Further argument.)

THE COURT: I understand from Mr. Covington's statements that he said there had been a change of status and that change was shown in the file?

MR. GIVEN: The only thing that would substantiate that in the record, he changed from the amount of time he was working as a minister, he worked more time as a minister and less time at secular work.

THE COURT: Isn't that the whole crux of the matter, though? If a man works full time at secular employment and just spends a part of his time as a minister?

MR. GIVEN: No, Your Honor. Suppose the petitioner changes his status merely for the purpose of evading service? He is not a minister in good faith. (Further argument.)

* * *

THE COURT: I believe I have all the arguments on both sides—is there anything further on your side, Judge Given?

MR. GIVEN: No, Your Honor, I don't believe there is.

THE COURT: I am of the opinion there is evidence in the file on which the Board was justified in making the classification; whether the evidence is conflicting, I don't think is a matter that is before me at all, but I think the only matter before me is whether there is any evidence there and I believe after hearing the arguments and the stipulations that there is evidence and therefore, I am going to dismiss this writ of habeas corpus.

I might say, in addition, that this question of whether or not a person is a minister of Jehovah's Witnesses is one of the most troublesome questions that I know of and the very fact that it is troublesome to the Court convinces me that it must also be troublesome to the Draft Boards. We continually encounter claims that every member of Jehovah's Witnesses is a minister and therefore, should be exempt under the law. I am convinced that that is not correct. I am equally convinced that there are some of the members of Jehovah's Witnesses who are entitled to ministerial classifications. They, in many ways, are analogous to other religious organizations. They have their meetings and they engage in the study of the Bible and they have preaching or what would be equivalent to preaching in the orthodox sects and so there certainly must be some of them who must be entitled to the ministerial classification and I have no doubt there are cases in which persons entitled to ministerial classification have been denied that classification. I think some of those cases have come under my observation, particularly one at Bluefield a year or so ago, of a young man who I was convinced, at that time, was entitled to ministerial classification and so dealt with him.

Now, in this case, I think it is very doubtful whether

the file shows a prima facie case of the registrant being a minister and certainly, if there is no prima facie case shown in the file, the mere claim on the part of the registrant that he is a minister, must be disregarded because he has undertaken to put in the file the evidence on which that claim is based and if the evidence does not show that he is a minister, then even though there were no evidence to the contrary, the Board in my opinion, would be justified in saying that he is not entitled to that classification.

In this case, I agree with the District Attorney that the whole file must be looked to—of course, the weight to be given the original claim and the original evidence may be affected by what happens afterwards, but it is evidence and worthy of consideration by the Board, on his original questionaire, if registrant said he was not a minister of religion and he claimed to be a conscientious objector and had his classification as a conscientious objector sustained, had he then refused to report for service in the conscientious objector's camp—and all these other matters that are in the file must be considered by the Board and considered in view of the fact that now he is working or was at the time he was classified, working part-time at a secular occupation and after considering all that, it is my opinion the Board does have the right, with what evidence is there to exercise its quasi judicial function of saying whether he is or is not a minister.

Having done that and having said he is not a minister, that it is not a question for any Court to review.

I have come to the conclusion that the file, as presented in the criminal trial, at which this registrant was convicted, on its face, that there was evidence on which the Board acted in making its classification.

I will determine, as I have said, that the writ must be dismissed.

MR. COVINGTON: Your Honor, we shall appeal, and I

should like, at this time, may it Please Your Honor, to make a motion to stay and also make a request that this petitioner be admitted to bail, pending disposition of this case on appeal.

MR. GIVEN: We want to object to that. We know of no authority upon which the defendant could be admitted to bail pending appeal.

THE COURT: How do you expect me to bail a man out, in prison and has been there a year or two?

MR. COVINGTON: It can be done—I am sure that it has been done in some other cases. It is rare, not a common thing, but I make that request and the rules provide that the Court can allow bail upon appeal in habeas corpus cases.

THE COURT: Well, if you will show me the rule on which you rely, I will see whether it is applicable in this case.

MR. COVINGTON: May I see the Rules of the Fourth Circuit? (Handing book to the Court.)

THE COURT: I believe under the Rule, that it would be incumbent upon me to make findings of fact and conclusions of law in this case, so I am going to put the duty on the District Attorney to prepare suitable findings of fact and conclusions of law and submit them to me, in line with what I have said.

* * *

THE COURT: It seems to me, under that rule, I have the discretion to admit him to bail and I do think that there is a serious question in this case and one that ought to be passed upon by the Court of Appeals and for that reason, I am going to admit him to bail.

Findings of Fact and Conclusions of Law

This proceeding having come on to be heard on the 4th day of April, 1946, pursuant to a continuance heretofore entered herein, the Court finds the following facts from evidence offered at the hearing:

FINDINGS OF FACTS

1. That petitioner and respondent are citizens of the United States, the petitioner being a citizen of the State of Pennsylvania, respondent being a citizen of the State of West Virginia; that petitioner was indicted and convicted of having violated the Selective Training and Service Act, in the United States District Court for the Western District of Pennsylvania; that a sentence of five years was imposed on the 22nd day of March, 1945, and commitment duly issued; and that petitioner was thereafter duly placed in the immediate custody of the respondent, Superintendent of the Federal Prison Camp at Mill Point, West Virginia, within the jurisdiction of this Court.

2. That petitioner was first classified by his local draft board on July 1, 1941, being then placed in Class I-A. Upon appeal, however, he was placed in Class IV-E. Thereafter, he refused to report pursuant to an order issued by his board, was indicted, sentenced to a term of two years, and served the sentence; that after his full release from parole, he was again placed in Class I-A by his local board, on May 20, 1944, later requested a personal appearance before the board, which was granted; that thereafter he appealed, and the appeal board continued petitioner in Class I-A; that an order was duly issued by petitioner's local board requiring him to report for induction, which he did, was accepted for service after final physical examination, and then refused to be inducted; that the indictment above-mentioned was based on petitioner's refusal to be

inducted pursuant to the last-mentioned order requiring petitioner to report for induction.

3. That at the trial upon said indictment, petitioner offered in evidence as defense to the charge, his entire draft board record, and certain other evidence which he contended would establish that the local draft board had acted illegally, in excess of its authority, without due process, and arbitrarily and capriciously denied him IV-D ministerial classification; that the trial court refused to admit such evidence, and instructed the jury not to consider any such evidence, that petitioner duly objected to the action of the Court in rejecting such evidence, which objection the trial court overruled and to which action of the court the petitioner excepted. The jury returned the verdict of "guilty", and the judgment above mentioned was based thereon. No appeal was taken or attempted to be taken from such judgment.

4. That upon the trial there was no evidence received by the court with reference to the petitioner's ministerial status or the illegality of the draft board's determination and that the proffered evidence above described was the only evidence offered by the petitioner in respect to the alleged illegality of the action of the draft board.

5. That the record of the petitioner made before his draft boards, filed as part of the evidence in this proceeding, contains evidence upon which the draft boards were justified in placing petitioner in Class I-A, as aforesaid, and denying his claim to the ministerial classification.

CONCLUSIONS OF LAW

1. That the action of the draft boards of petitioner in denying him the ministerial classification and in placing him in Class I-A was not a denial of due process of law and was not arbitrary or capricious.

2. That the action of the trial court in rejection of

the evidence offered and charging the jury, as aforesaid, was not a denial of due process of law.

3. That the custody of petitioner by the respondent is lawful and in compliance with the judgment aforesaid, and the writ of habeas corpus heretofore awarded herein should be discharged and petitioner remanded to the custody of respondent.

Given under my hand, this 5th day of April 1946.

Ben Moore
United States District Judge

Order of the Court

This proceeding came on the 4th day of April, 1946, pursuant to a continuance heretofore awarded herein, petitioner, being now in custody of the Court and relator and petitioner being represented by Hayden C. Covington and Horace S. Meldahl, and respondent by Leslie E. Given, United States Attorney, and the Court having heard the evidence offered on behalf of the petitioner and of respondent, and having made its findings of fact and conclusions of law, hereby filed herein and made a part of the record of this proceeding, is of the opinion that the custody of the petitioner now held by respondent is lawful and in pursuance of a valid and lawful judgment made and entered by the United States District Court for the Western District of Pennsylvania, wherein the United States of America was plaintiff and the said petitioner was defendant, and that the writ of habeas corpus heretofore awarded herein should be discharged and said petitioner remanded to the custody of said respondent. It is, therefore,

CONSIDERED by the Court that the writ of habeas corpus heretofore awarded herein be, and the same hereby is, discharged, and that the said petitioner, Theodore Martin Sunal, be and he hereby is, remanded to the custody of the respondent, David R. Large, Superintendent of the Federal Prison Camp at Mill Point, West Virginia, to be there dealt with in accordance with the aforesaid judgment made and entered by the United States District Court for the Western District of Pennsylvania, to all of which action of the Court the relator and petitioner duly object and except.

Thereupon, the petitioner indicated to the Court that he intended to take an appeal herein, and moved the Court to grant the petitioner bail during the pendency of any such

appeal; and the Court being of the opinion to grant such bail, it is further

ORDERED that the said petitioner be released from custody during the pendency of any such appeal, and with the entry of the final order relating thereto, and that the penalty of the bond therefor be One Thousand ($1,000), with good and sufficient surety, conditioned upon the said petitioner making his personal appearance before the United States District Court for the Southern District of West Virginia, and delivering himself to the United States Marshal for the Southern District of West Virginia, to be returned to the custody of said respondent, or his successor, upon final disposition of such appeal. Thereupon, petitioner appeared in Court, with the surety, which bond and surety being duly approved by the Court, and which bond being duly executed, was accepted by the Court. To the allowing of such bail, the respondent objected and excepted.

ENTER: April , 1946
Ben Moore
District Judge

[fol. 101] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5490

THEODORE MARTIN SUNAL, Appellant,

versus

DAVID R. LARGE, Superintendent, Federal Prison Camp, Mill Point, West Virginia, Appellee

Appeal from the District Court of the United States for the Southern District of West Virginia, at Charleston

April 25, 1946, the transcript of record is filed and the cause is docketed.

Same day, the original exhibits are certified up.

April 27, 1946, the appearance of Horace S. Meldahl is entered for the appellant.

May 2, 1946, the appearance of Hayden C. Covington is entered for the appellant.

May 10, 1946, stipulation as to the time for the filing of appellant's brief and appendix is filed.

ORDER PERMITTING APPELLEE TO WITHDRAW EXHIBITS—Filed May 11, 1946

[Style of Court and Title omitted]

On consideration of the application of counsel for the appellee, the Clerk of this Court is hereby authorized to transmit to Theron L. Caudle, Assistant Attorney General, the original exhibits certified up to this Court in the above case.

The said original exhibits to be returned to this Court on or before May 25, 1946.

[fol. 102] May 10, 1946.

Morris A. Soper, U. S. Circuit Judge.

June 1, 1946, stipulation as to the time for the filing of appellee's brief and appendix is filed.

Same day, brief and appendix on behalf of the appellant are filed.

June 13, 1946, brief and appendix on behalf of the appellee are filed.

June 18, 1946, appearance of Irving S. Shapiro, Attorney, Department of Justice, is entered for the appellee.

ARGUMENT OF CAUSE

June 18, 1946, (June term, 1946) cause came on to be heard before Groner, Chief Justice, U. S. Court of Appeals for the District of Columbia; Soper, Circuit Judge, and Chesnut, District Judge, and was argued by counsel and submitted.

[fol. 103] OPINION—Filed July 29, 1946

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5490

THEODORE MARTIN SUNAL, Appellant,

versus

DAVID R. LARGE, Superintendent, Federal Prison Camp, Mill Point, West Virginia, Appellee

Appeal from the District Court of the United States for the Southern District of West Virginia, at Charleston

Argued June 18, 1946. Decided July 29, 1946

Before Groner, Chief Justice, U. S. Court of Appeals for the District of Columbia; Soper, Circuit Judge, and Chesnut, District Judge

Hayden C. Covington (Horace S. Meldahl on brief) for Appellant, and Irving S. Shapiro, Attorney, Department of Justice, (Theron L. Caudle, Assistant Attorney General; [fol. 104] Leslie E. Given, United States Attorney, and Robert S. Erdahl, Attorney, Department of Justice, on brief) for Appellee.

CHESNUT, District Judge:

The appellant in this habeas corpus case, Theodore Martin Sunal, a Jehovah's Witness, was indicted, tried and

convicted in the Western District of Pennsylvania under section 11 of the Selective Training and Service Act of 1940 (54 Stat. 894; 50 U. S. C., App. s. 311), for refusing induction into the Armed Forces of the United States after reporting for induction under an order of his Local Board, and being found physically fit upon examination. At the trial of his case he offered to submit evidence which he contended would show that he was entitled to exemption from military service in that he was a minister of religion and that he had been improperly classified for military service by the Local Board. The trial court refused to admit the tendered evidence and upon his conviction by a jury he was, on March 22, 1945, sentenced to five years imprisonment. He did not appeal but shortly after the decision by the Supreme Court, February 4, 1946, in the similar cases of Estep and Smith, he filed a habeas corpus petition in the Southern District of West Virginia where he was then confined. In the petition he alleged that the judgment and sentence under which he was confined was null and void because the court lacked jurisdiction by reason of the denial of his constitutional right of due process consequent upon rejection of the evidence tendered by him. The habeas corpus court issued the writ and, after the return by respondent, held a hearing in the case, and upon [fol. 105] consideration of the evidence offered by the petitioner, concluded that it was legally insufficient to show an improper classification by the Local Board and thereupon remanded the petitioner who, on motion of his counsel, was admitted to bail pending appeal.

Two questions are presented on this appeal: (1) a matter of procedure, whether the remedy of habeas corpus was available to the appellant under the circumstances, and (2) if so, whether the remand of the petitioner was proper under the evidence submitted to the habeas corpus court.

First: Counsel for the appellee (respondent in the habeas corpus proceeding) in support of his contention that habeas corpus was not an available remedy to the petitioner, refers to the often stated principle that habeas corpus cannot be used as a substitute for an appeal or a writ of error. *Ex parte Siebold*, 100 U. S. 371, 375; *In re Coy*, 127 U. S. 731, 758. But, as recently pointed out in *Bowen* v. *Johnston*, 306 U. S. 17, 27, and *Waley* v. *Johnston*, 316 U. S. 101, the rule is not so inflexible that it may not

yield to exceptional circumstances where the need for the remedy afforded by the writ is apparent, and it is the only remedy available to the petitioner.

It is quite impossible to overestimate the great importance of the writ of habeas corpus as a "precious safeguard of personal liberty." Its history in English and American jurisprudence is familiar to all students of constitutional government. It was in use in England as a common law writ long prior to its firm statutory establishment by the famous Habeas Corpus Act of May 27, 1679, (31 Car. II) "for the better securing of the liberty of the subject." *Ex parte Watkins*, 3 Pet. 193; Blackstone Comm. Cooley's 4th*t* Ed. Book III, c. 8. Its importance was [fol. 106] recognized in the Federal Constitution which, in Art. I, s. 9, provided "the privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." *Ex parte Milligan*, 4 Wall. 2. The authority for its issuance by federal courts and judges and the limitations thereon and the procedures therein are regulated by federal statute. 28 U. S. C. A., ss. 451-466. Section 453 confers the power to issue it in a case of this general nature, subject however to the general principles with regard to the exercise of the power established by judicial decisions.

Despite the general rule that habeas corpus may not be properly used as a substitute for an appeal, on its face seemingly applicable to the instant case, there are nevertheless cases where, in view of exceptional circumstances, the general rule should not be applied. We find such exceptional circumstances in the instant case in view of the recently developed doctrine of the Supreme Court relating to the "finality" of decisions of Local Boards under the Selective Service Act of 1940, 50 USCA, App. c. 310(a) In *Falbo* v. *United States*, 320 U. S. 549, it was held by a divided court in a criminal prosecution for wilful failure to obey the Local Board's order to *report* for assignment to work of national importance, that the registrant was not entitled to show that he had been erroneously classified as a conscientious objector rather than as a minister of religion; and that, assuming the existence of a constitutional requirement that judicial review be available to test the validity of the Board's classification, Congress was not required to provide for

such review prior to *final acceptance* of the registrant for [fol. 107] service.[1] The effect of the decision in that case was very widely understood by the Bench and Bar to be that there could be no judicial review of the Board's classification until after the administrative process had been *finally completed by the induction of* the registrant into military service; but that thereafter he could obtain this review by a writ of habeas corpus addressed to his military commander.[2] In *Billings* v. *Truesdell*, 321 U. S. 452, the court held that a registrant, who had reported for induction but refused to voluntarily take the oath of induction, was not lawfully subject to military discipline and was only amenable to civil law under section 11 of the Selective Service Act. But in the latest of this [fol. 108] sequence of cases, *Estep and Smith* v. *United States*, decided February 4, 1946, the court held that a registrant who voluntarily *reported for induction* but nevertheless *refused to take the induction oath*, had completed his administrative remedies to the end, and, when

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[1] See also *Yakus* v. *United States*, 321 U. S. 414.

[2] See opinion of Mr. Justice Frankfurter concurring in the result of the cases of Estep and Smith, infra. With respect to the understanding by the federal judiciary of the Falbo case in relation to the finality of the decisions of the Local Boards and the non-reviewability thereof in criminal cases, he said:

"Such has been the construction of more than forty judges in the circuit courts of appeals. The question raised by the facts of this case has come before the Circuit Courts of Appeals for the First, the Second, the Third, the Fourth, the Fifth, the Sixth, the Seventh and the Eighth Circuits. All eight of them, have ruled that judicial review of a draft board classification is not available, in a criminal prosecution, even though the registrant has submitted to the pre-induction physical examination. *Sirki* v. *United States*, 145 F. 2d. 749 (C. C. A. 1st, 1944); *United States* v. *Flakowicz*, 146 F. 2d. 874 (C. C. A. 2d. 1945); *United States* v. *Estep*, 150 F. 2d. 768 (C. C. A. 3d. 1945); *Smith* v. *United States*, 148 F. 2d. 288 (C. C. A. 4th, 1945); *Koch* v. *United States*, 150 F. 2d. 762 (C. C. A. 5th, 1942); *Fletcher* v. *United States*, 129 F. 2d. 262 (C. C. A. 5th, 1942); *Klopp* v. *United States*, 148 F. 2d. 659 (C. C. A. 6th, 1945); *United*

thereafter indicted for failure to voluntarily take the oath of induction, was entitled at his trial to show that his classification for military service and denial of his claim for exemption therefrom as a minister of religion, as determined by the order of his Local Board, was "beyond the jurisdiction" of the Local Board if *without foundation in fact*, and that the Board's order was therefore a nullity.

It is to be noted in the instant case that Sunal was sentenced in the criminal case March 22, 1945, which was more than a year *subsequent* to the decision in the *Falbo* case on January 3, 1944, and nearly a year *prior* to the decision in the *Estep and Smith* cases. It is also to be noted that the defense offered by Sunal, and rejected by the court, was substantially the same as that offered by Estep and Smith and for them held admissible. It is inferable and indeed probable that the evidence offered by Sunal was rejected by the trial judge on the supposed authority of the *Falbo* case. And it is a further fair

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States v. *Rinko*, 147 F. 2d. 1 (C. C. A. 7th, 1945); *Gibson* v. *United States*, 149 F. 2d. 751 (C. C. A. 8th, 1945). Such was the impact of this court's reasoning in the *Falbo* case that it greatly influenced the ruling of the Circuit Courts of Appeals as to the finality of local board orders and practically silenced whatever doubts may theretofore have been held by a few of the judges."

Mr. Justice Frankfurter also quoted from the report in January 1945 of the House Committee — Military Affairs as follows:

"Under the Act as it is now written, registrants who are ordered to submit to induction into the armed forces may not refuse and defend such refusal in a criminal prosecution on the gronud that their classifications were not given fair consideration by their boards. In order to obtain a judicial determination of such issues such registrants must first submit to induction and raise the issue by habeas corpus." H. R. Rep. No. 36, 79th Cong. 1st Sess. (1945) 4-5.

See also note 15 to the opinion of the court in the *Estep* case by Mr. Justice Douglas; and *United States ex rel. Trainin* v. *Cain*, (2d. Cir.) 144 F. 2d. 944; *United States ex rel. Bayly* v. *Reckord* (D. C. Md.) 51 F. S. 507, 511.

inference that no appeal from the judgment and sentence was taken in the *Sunal* case by reason of counsel's understanding that it would be futile in view of the Falbo decision. The time for appeal in the *Sunal* case had expired long before the decision in the *Estep and Smith* cases. The inevitable result is that the only available remedy remaining to Sunal was relief by habeas corpus, if he was entitled to any relief on the merits of his case. Furthermore we think the opinion of the majority of the court in [fol. 109] the *Estep and Smith* cases indicates that in such a situation habeas corpus is an appropriate remedy. Mr. Justice Douglas, speaking for the court, there said:

"But if we now hold that the registrant could not defend at his trial on the ground that the Local Board had no jurisdiction in the premises, it would seem that the way would then be open to him to challenge the position by the Local Board after conviction by habeas corpus. The court would then be sending men to jail today when it was apparent that they would have to be released tomorrow.

"We do not suggest that because Congress has provided one judicial remedy another should be implied. We may assume that where only one judicial remedy is provided, it normally would be deemed exclusive. *But the fact that habeas corpus after conviction is available in these cases* gives added support to our reading of section 11. It supports a rejection of a construction of the Act that requires the courts to march up the hill, when it is apparent from the beginning that they will have to march down again.

"We express no opinion on the merits of the defenses which were tendered. Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case." (Italics supplied.)

We think this expression of view by the court necessarily means that in a case where the proffered evidence had been rejected without consideration as to its legal effect, and the time had passed for an appeal, the convicted defendant had an available remedy in habeas corpus to challenge the alleged erroneous classification made by the Board; but in a case which was still open on appeal there should be a reversal and new trial to permit consideration of the defense prior to a verdict and thus avoid the necessity of

[fol. 110] resorting to habeas corpus after conviction.[3] Counsel for the appellee contends that this is not the clear import of the opinion and in support of that view calls attention to the case of *Rea* v. *McDonald*, 5th Cir. 153 F. 2d. 190, decided January 12, 1946, a few weeks prior to the decision in the *Estep and Smith* cases, and particularly to the denial of certiorari by the Supreme Court on March 25, 1946, a few weeks after the decision in Estep and Smith. The facts in the *Rea* case were like those in Estep and Smith, and Sunal. In each case the registrant was a Jehovah's Witness, claimed full exemption from military service on the ground that he was a minister of religion, and in each case had, pursuant to the orders of the Local Board, appeared for induction but had refused to take the induction oath. In each case the same defense was tendered in the criminal case but rejected by the trial judge. After his conviction in the criminal case Rea applied for release on habeas corpus; but this was denied by the district judge and the judgment was affirmed by the 5th Circuit. In all four cases the registrant had the same leading trial counsel. It is also pointed out by the appellee in this case that in the brief for the government in response to Rea's petition for certiorari, special attention was called to that portion of the opinion in the *Estep and Smith* cases which has been above quoted, and government counsel in effect suggested that the court grant the writ of certiorari and reverse the judgment below if the quoted portion of the opinion in the *Estep and Smith* cases was of the import which we have attributed to it. The argument is then submitted that the denial of certiorari should imply that our understanding [fol. 111] of the opinion in the *Estep and Smith* cases is mistaken. We have not been able to reach this conclusion in view of the repeated admonition that the denial of certiorari is not to be taken as an expression of opinion by the Supreme Court.

Second: The remaining and ultimate question is whether the remand of the appellant, as a result of the habeas corpus hearing, was proper and in accordance with the federal statute (28 USCA., s. 461) which reads:

"The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing

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[3] See also the concurring opinion of Mr. Justice Rutledge in Estep and Smith, and the note to his opinion.

the testimony and arguments, and thereupon dispose of the party as law and justice require."

The contention on behalf of Sunal is that he should have been discharged from custody without prejudice to the right to the government to re-try him on the criminal indictment in the Western District of Pennsylvania. The theory advanced is that the judgment and sentence of the court in that case was null and void because, by the refusal of the proffered evidence the court *lost jurisdiction*. The argument runs as follows: The right to make a defense in a criminal case is a constitutional right granted by the due process clause of the 5th Amendment; that the rejection of the evidence offered constituted a denial of the right to defend and, therefore, a denial of a constitutional right which rendered the judgment void; and that habeas corpus is an appropriate remedy to release the defendant so convicted. Reference is made to the sentence in *Bowen v. Johnston, supra*, page 24. "But if it be found that the court had no jurisdiction to try the petitioner, or that in the proceedings his constitutional rights have been denied, the remedy of habeas corpus is available."

[fol. 112] We think the contention untenable in its application to the particular case. It is clear that the district court for the Western District of Pennsylvania had full and complete jurisdiction to try the case. The defendant was not denied the right to defend against the particular charge that was made, which was his wilful refusal to take the induction oath. The adverse ruling on his proffered evidence was, it must now be conceded, a trial error which could and should have been corrected on appeal. But it is a misnomer to say that the trial error caused the court to lose jurisdiction in the case. It resulted in an erroneous judgment but this is far different from an absence of jurisdiction. In rejecting the proffered evidence the trial court evidently acted on its interpretation of the meaning of the "finality" of decision of the Local and Appeal Boards under the Selective Service Act (50 USCA, App. s. 310 (a) (2)) and its understanding of the decision of the Supreme Court in the *Falbo* case. It was called upon to construe and apply the Act. In its ruling, erroneous though it was, the court was exercising a jurisdiction which it undoubtedly had and it cannot properly be said to have "lost jurisdiction" because of the error on exercising it.

Collins v. *Johnston*, 237 U. S. 502; Matter of Moran, 203 U. S. 96, 105; *Price* v. *Johnston*, (9th Cir.) 125 F. 2d. 806, 811, cert. den. 316 U. S. 677; *Van Meter* v. *Snook*, 5th Cir. 15 F. 2d. 377; *Rea* v. *McDonald*, 153 F. 2d. 190; *Ex parte Parks*, 93 U. S. 18; *Ex parte Siebold*, 100 U. S. 371, 375; Hans Nielsen, Petitioner, 131 U. S. 176, 184. Nor is the instant case analogous to that class of cases where, by virtue of matter *de hors* the record jurisdiction originally rightly acquired is destroyed by occurrences which by their own force render the trial really a nullity; as for instance [fol. 113] (see *Frank* v. *Mangum*, 237 U. S. 309) the independence of the trial was destroyed by a mob; or as in *Johnston* v. *Zerbst*, 304 U. S. 458, the defendant did not enjoy the benefit of counsel as required by the 6th Amendment. Indeed the error in this case was one which ordinarily could have been corrected only on appeal and not by habeas corpus save for the exceptional circumstances mentioned.

The appellant also contends that the judgment in the criminal trial was void because he was denied a constitutional right, when his proffered evidence was rejected. But if, as the habeas corpus judge determined, the proffered evidence when examined, was found to constitute no legal defense to the indictment, it cannot be said that the defendant was denied a constitutional right.

At the habeas corpus hearing counsel did not have available a transcript of the record in the criminal case. In lieu thereof they entered into a stipulation which included an exhibit to the court of Sunal's complete "cover file" before his Local and Appeal Boards. The stipulation also included the fact that the criminal trial was held before a jury in which the defendant offered testimony *de novo* as to his activity, background and training as a minister. But what that evidence was other than that contained in the cover file does not appear. It was further stipulated that the evidence was offered for the purpose of showing the Draft Board exceeded its authority and therefore acted illegally, and that the evidence so offered was rejected because the trial judge in the criminal case was of the opinion that the jury could not inquire into the validity of the Draft Board proceedings and could not determine whether or not the registrant was a minister within the [fol. 114] Act and Regulations; and that thereafter the court instructed the jury that they could not consider that

question and that the only question for them to determine was whether or not the defendant unlawfully, wilfully and knowingly refused to take the induction oath as alleged in the indictment. Exceptions were made to the ruling but no appeal was taken.[4]

The trial judge in the habeas corpus case then, after considering the arguments of counsel, expressed the opinion that he should examine the file to ascertain therefrom whether the Local Board did have a basis in fact for its classification of the registrant. After that examination the trial judge made findings of fact which included the following:

"5. That the record of the petitioner before his Draft Board filed as a part of the evidence in this proceeding, contains evidence from which the Draft Boards were justified in placing the petitioner in Class 1-A as aforesaid, and denying his claim to a ministerial classification."

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[4] We doubt the advisability of the practice followed in this case of stipulating in a habeas corpus case the contents of the transcript of record of another court. When one district court of the United States reviews on habeas corpus the judgment of another court of equal dignity, it would seem important that the reviewing court should act only on the record itself and not merely on a stipulation of counsel as to the contents of that record. It often occurs in the administration of the federal criminal correctional system that the prisoner is confined in a territorial jurisdiction far distant from the court in which he was tried. The procedure in such case is by habeas corpus. Undesirable results in judicial administration are possible to occur unless the reviewing court has the definite and clear record of the proceedings in the trial court before it, when it exercises its jurisdiction in habeas corpus to release or remand the prisoner. The review and reversal by the habeas corpus court of the trial court of equal dignity is a matter calling for great circumspection and care. And where the supposed constitutional defect in the trial is necessarily included in the record in the criminal case, it would seem that requisite care would require the production of a transcript of the record. Of course where the alleged constitutional defect is *de hors* the record, explicit and clear testimony should be required.

Counsel for the appellant here contends that this was [fol. 115] improper procedure because the attack on the Local Board's classification could be made only in a trial on the indictment in the criminal case, and that the question of the sufficiency of the evidence to sustain the contention of arbitrary and capricious classification by the Local Board could not properly be passed on in the habeas corpus proceeding. We hold to the contrary. The statute made it the duty of the habeas corpus trial judge to dispose of the petitioner "as law and justice require." By petitioning for the writ the appellant invoked the judgment of the judge in the habeas corpus case. He cannot now complain that the judgment was given, if it was instrinsically correct. He failed to exercise his right of appeal and thereby he lost all further right to complain except by invoking judicial judgment in habeas corpus, and even this remedy would not have been available to him save for the exceptional circumstances. His contention that he had a constitutional right to have the issue passed upon by a jury in a criminal case is untenable when it is judicially determined that the evidence offered by him raised no issue of fact and was, as a matter of law, insufficient as a legal defense. The guarantee of a jury trial by the 6th Amendment does not require the submission to the jury of evidence which can have no legal effect or consequence in the trial. It is true of course, as we now know, that the question of the sufficiency of the evidence should properly have been passed upon by the trial judge in the criminal case rather than subsequently determined by the judge in the habeas corpus proceeding. And this right could presumably have been established on appeal but was lost by the failure to take an appeal.

There remains for final consideration the substantial [fol. 116] question whether the evidence submitted to the trial judge in the habeas corpus case was sufficient in law to constitute a valid defense. To determine this it is first necessary to ascertain the permissible scope of review of the Local Board's action. This is authoritatively outlined in the opinion of the court in the *Estep and Smith* cases.[5]

"The provision making the decisions of the Local Boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial

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[5] Slip opinion page 6.

review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the Local Boards was justified. The decisions of the Local Boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the Local Board is reached only if there is no basis in fact for the classification which it gave the registrant. See *Goff* v. *United States*, 135 F. 2d. 610, 612."

See also *United States ex rel. Trainin* v. *Cain*, 2d. Cir. 144 F. 2d. 944, cert. den. 323 U. S. 795, cited with approval in the Estep opinion.

If the result of the examination of the Local Board's file as made by the trial judge in this case is to be properly treated as a finding of fact, we would have no proper basis for rejecting it because it is not clearly erroneous.* But as the file is completely in writing it may be considered to present a question of law. On this latter assumption we have considered the contents of the file for the purpose of determining, within the proper scope of review, whether it presents sufficient evidence as a matter of law to show that [fol. 117] the Local Board exceeded its jurisdiction in its classification; or, on the contrary, whether there was a basis in fact for the classification it made. We conclude that the Board did not exceed its jurisdiction in this case. The file is very voluminous. But a very condensed summary of its material parts shows the following:

Sunal registered with Local Board No. 26, Pittsburgh, Pennsylvania, and on January 15, 1941 he stated in answering his questionnaire, among other things, that his occupational activity had been that of an automotive carbureter and electrical mechanic for the past six years with an average weekly earning of $25; that he was not engaged in any other business or work and not licensed in any trade or profession. He also stated "I am not a minister of religion." He did claim exemption from military service as a conscientious objector, and in support of that claim stated that he was a Jehovah's Witness and as such rendered door to door testimony service presenting the Gospel message to those who cared to hear; but since 1934 his only occu-

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*FRCP. Rule 52.

pation had been mechanical and that he had been raised from childhood as one of Jehovah's Witnesses, and as such attended the congregation of Kingdom Hall, Pittsburgh, the pastor or leader of which was Joseph Petti. On May 10, 1941 the Local Board classified him as 1-A. On May 15, 1941 Sunal for the first time claimed classification as a minister of religion as an "associate minister of the Alleghany company of Jehovah's Witnesses."

At that time he appeared before the Local Board and submitted affidavits of Petti and other individuals tending to support his claim. On July 8, 1941 he had another hearing before the Local Board which summarized his evidence then given as largely repetitive of previous state-
[fol. 118] ments, including the fact that he had no regular church or institution where he preached but went from house to house in the evenings to preach the doctrine of Jehovah's Witnesses and that he received no salary or remuneration from this but depended entirely upon his secular job to support himself. The Local Board had classified him as 1-A and declined to change that classification as a result of his several hearings. He appealed to his Board of Appeal on December 28, 1941, and addressed a letter to it explaining that in answering his questionnaire he had stated he was not a minister of religion because he regarded himself as a "minister of Christianity." He claimed to be an "ordained minister of Christianity." With reference to the appellant's claim that he was a conscientious objector the Local Board referred the question to the Board of Appeal or Department of Justice. On January 27, 1942, the Appeal Board classified the appellant as a conscientious objector. He was subsequently ordered to report to his Local Board for work of national importance but failed to do so.

On May 19, 1942 he was convicted under the Selective Training and Service Act for that failure and sentenced to prison for two years and to pay a fine of $100. He was released from prison on December 6, 1943 and upon the expiration of his parole period he renewed to his Local Board his claim of classification as a minister of religion. He submitted no new evidence at that time. On May 19, 1944 the Local Board classified him as 1-A. He requested and received further personal hearings in which he stated that since his release he had increased the time spent in

his activities as a Jehovah's Witness to approximately 5 hours a day or 150 hours a month, and that he worked for 4 hours a day as a mechanic, and had been designated [fol. 119] a "pioneer" by the Watch Tower Bible and Tract Society and that his work as a Witness consisted of going from house to house conducting Bible studies; that he received no remuneration for it and that he had been trained for it by his parents and in Watch Tower Bible Schools. He further claimed he became an ordained minister by publicly witnessed immersion. As such an ordained minister he had the right to perform and preach funeral services, marriage ceremonies and immersion (baptismal) discourses. He submitted numerous affidavits of other Jehovah's Witnesses to the effect that they considered him a minister of religion. He apparently did not renew his claim previously made as a conscientious objector. After due consideration of the further facts the Local Board found no change in his status and classified him as 1-A. He appealed to the Board of Appeal and submitted a further letter outlining the grounds on which he contended the Local Board erred. On August 31, 1944 the Board of Appeal by vote of four to nothing classified him as 1-A. Thereafter he submitted further information cumulative of that already before the Local Board which, however, concluded that it did not warrant a reopening of the case. He thereafter appealed to the State and National Directors of Selective Service to intercede on his behalf but they declined to do so. He was ordered to report for induction on October 25, 1944. He reported but refused to submit to induction. His second criminal prosecution then resulted.

From this we find no evidence of arbitrary or capricious action in fact by the Local and Appeal Boards. All the evidence submitted by the registrant was apparently carefully considered and in our opinion there was basis in fact for the conclusion reached by the respective Boards. In [fol. 120] substance it comes to this: Sunal was a sincere and devout member of the religious sect known as Jehovah's Witnesses. He was active in the pursuit of his faith and spent much of his time in advancing his religious beliefs by seeking to impress them on other people. But a substantial part of his time was devoted to purely secular work from which he obtained his living. He was not a

pastor or minister of his congregation to which he belonged and obtained no remuneration for his religious activities. As to his alleged ministerial status, the situation was qualitatively not materially different from that of any other member of Jehovah's Witnesses although as a "pioneer" his activities were more extensive than that of some others.

The main contention of counsel for the appellant that he should have been classified as a minister of religion and that there was no factual basis for a different classification and therefore the action of the Local and Appeal Boards was arbitrary and capricious, is based on Sunal's activity as a "pioneer" among Jehovah's Witnesses. But in view of the other facts found by the Board, that contention is, in our opinion, not tenable. Section 305 of Title 50, United States Code, App. provides—

"Regular or duly ordained ministers of religion * * * shall be exempt from training and service (but not from registration) under this Act."

Section 622.44 of the Regulations (9 F.R. 5202) provides:

"(b) A 'regular minister of religion' is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is [fol. 121] recognized by such church, sect or organization as a minister.

"(c) A 'duly ordained minister of religion' is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship and who customarily performs those duties."

Sunal's contention that on the basis of his "cover file" he could only properly be classed as a minister of religion is not new. Under quite similar facts the same contention has been made in many previous cases by the same counsel for Jehovah's Witnesses. It has generally been rejected by the courts. For instance, in *Rase* v. *United States*, 129 F. 2d 204, 209, it was said by Circuit Judge Simons for the 6th Circuit:

"The phrase 'minister of religion' as used in the Act is to be interpreted according to the intention of the Congress, and not by the meaning attached to it by the members of any particular group. Congress undoubtedly intended to exempt such persons as stand in the same relationship to the religious organizations of which they are members, as do regularly ordained ministers of older and better known religious denominations. This is borne out by the provision for the exempting of theological or divinity students. If we understand the appellant's argument, every member of his sect is a minister of religion and so entitled to exemption. No differentiation is to be recognized between shepherd and flock or between pastor and congregants. Followed to its logical conclusion, this would mean that all of the members of any religious group which imposes upon its adherents an obligation to teach and preach its beliefs or to make converts, are exempted under the Selective Service Acts without regard to whether such activity constitutes their sole or [fol. 122] principal vocation. It is inconceivable that it was the intention of the Congress to incorporate in the Act an exemption so broad and all-embracing. The sta-utory exemption must be applied in consonance with the clearly apparent purpose of the Congress, and not in response to the interpretation, placed upon it by particular religious groups or their adherents."

A similar view has even more recently been taken of the proper application of the law by the First Circuit in an opinion by Judge Dobie, *Swaczyk* v. *United States*, decided June 1946; and again by District Judge Hincks in a carefully considered opinion in the District Court for Connecticut. *United States ex rel. Kulick* v. *Kennedy, Warden*, decided May 6, 1946.[7] Cf. *United States ex rel. Hull* v. *Stalter*, 151 F. 2d. 633.

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[7] There are numerous other cases which have considered claims of Jehovah's Witnesses to ministerial classifications somewhat similar to the facts of the instant case. See *United States* v. *Flint*, 2d. Cir. 142 F. 62; *United States* v. *Pitt*, 3d. Cir. 144 F. 2d. 169; *Baxley* v. *United States*, 4th Cir., 134 F. 2d. 998; *Goff* v. *United States*, 4th Cir. 135 F. 2d. 610; *Honaker* v. *United States*, 4th Cir. 135 F. 2d 613; *Buttecali* v. *United States*, 5th Cir. 130 F. 172; *Benesch* v. *Underwood*, 6th Cir. 132 F. 2d. 430; *United States* v. *Mes-*

We conclude that the evidence submitted to the District Judge in the habeas corpus proceeding supports his conclusion that there was a basis in fact for the denial by the Local and Appeal Boards of Sunal's claim for exemption as a minister of religion, and the judgment appealed from must, therefore, be

Affirmed.

[fol. 123] JUDGMENT—Filed and Entered July 29, 1946

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5490

THEODORE MARTIN SUNAL, Appellant,

vs.

DAVID R. LARGE, Superintendent, Federal Prison Camp, Mill Point, West Virginia, Appellee

Appeal from the District Court of the United States for the Southern District of West Virginia.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of West Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District

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sersmith, 7th Cir. 138 F. 2d. 599; *Seele* v. *United States*, 8th Cir. 133 F. 2d. 1015; *Crutchfield* v. *United States*, 9th Cir. 142 F. 2d. 170.

In *Kulick* v. *Kennedy*, *supra*, both the procedural and the factual situations were very similar to that in the instant case. Judge Hincks concluded that the writ of habeas corpus was procedurally available under the circumstances; that the review of the evidence tendered and rejected in the criminal prosecution was properly to be judicially appraised by the trial judge in the habeas corpus case; and that on such appraisal it furnished no sufficient legal basis to show that there was any evidence which could properly have been submitted in the criminal prosecution that the defendant's classification was illegal.

Court appealed from, in this cause, be, and the same is hereby, affirmed.

D. Lawrence Groner, Chief Justice, U. S. Court of Appeals for the District of Columbia; Morris A. Soper, U. S. Circuit Judge; W. Calvin Chesnut, U. S. District Judge.

August 1, 1946, motion of appellant for a stay of the mandate is filed.

ORDER STAYING MANDATE PENDING APPLICATION FOR WRIT OF CERTIORARI—Filed August 3, 1946

[Style of Court and Title Omitted]

Upon the application of the Appellant, by his counsel, and for good cause shown,

[fol. 124] It is ordered that the mandate of this Court in the above entitled cause be, and the same is hereby, stayed pending the application of the said Appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided, said application is filed in the said Supreme Court within 60 days from this date.

August 2, 1946.

Armistead M. Dobie, U. S. Circuit Judge.

UNITED STATES SUPREME COURT, OCTOBER TERM, 1946

UNITED STATES OF AMERICA ex Rel. RICHARD J. SUNAL, Petitioner,

v.

DAVID R. LARGE, Superintendent, Respondent

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit at No. 5490

STIPULATION

Subject to the approval of this Court, it is hereby stipulated and agreed by and between attorneys for the respective parties hereto, that, for the purpose of the petition

for a writ of certiorari, the printed record shall consist of the following documents:

(1) Printed appendix filed by appellant, United States of America ex rel. Richard J. Sunal, in the circuit court of appeals.

(2) One copy of the opinion of the United States Fourth Circuit Court of Appeals, dated July 29, 1946, and filed in this cause.

(3) One copy of the judgment of said circuit court of ap-
[fol. 125] peals rendered on July 29, 1946, pursuant to the opinion filed herein.

(4) One copy of the order staying the mandate pending application in the Supreme Court of the United States for a writ of certiorari to the Fourth Circuit Court of Appeals.

(5) One copy of the docket entries of the clerk showing the nature of all papers filed herein, and the date of filing of each, together with a minute of all actions taken by the court in this cause, in the said circuit court of appeals.

(6) A copy of this stipulation.

It is further stipulated and agreed that petitioner will cause the clerk of said circuit court of appeals to certify to the Supreme Court the typewritten transcript of record together with all exhibits not reproduced in appellant's printed appendix before the circuit court of appeals, including petitioner's Selective Service file, and that reference may be had to the typewritten transcript of record and to such exhibits with the same force and effect as though incorporated in the printed record.

Dated, August 7, 1946.

J. Howard McGrath, Solicitor General of the United States, Counsel for Respondent; Hayden C. Covington, Counsel for Petitioner.

[fol. 126] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the

foregoing is a true copy of the appendix to brief of appellant and the proceedings in the said Circuit Court of Appeals in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals, and constitute and is a true transcript of the record and proceedings in the said Circuit Court of Appeals in said cause, made up in accordance with the stipulation of counsel for the respective parties, for use in the Supreme Court of the United States on application for writ of certiorari.

In testimony whereof, I hereunto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 16th day of August, A. D., 1946.

Claude M. Dean, Clerk, U. S. Circuit Court of Appeals, Fourth Circuit. (Seal.)

(6463)

[fol. 127] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 535.

ORDER ALLOWING CERTIORARI—Filed January 20, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourh Circuit is granted. The case is transferred to the summary docket and assigned for hearing immediately following No. 840.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9246)

FILE COPY

No. 535

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FILED
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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

□

THEODORE MARTIN SUXAL, *Petitioner*

v.

DAVID R. LARGE, SUPERINTENDENT
FEDERAL PRISON CAMP
MILL POINT, W. VA.
Respondent

□

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

HAYDEN C. COVINGTON
Counsel for Petitioner

INDEX

Subject Index

	PAGE
Title of cause	*Front cover*, 1
Petition for writ of certiorari	1
Summary of matters involved	1
Questions presented	3
Statement of case	5-8
Form and history of action	5
Facts	5
How issues raised	8
Specification of error	9
Reasons relied on for granting writ	10
SUPPORTING BRIEF	13-34
Preliminary	13
Argument	13-33
ONE—Refusal by the sentencing court to permit petitioner to challenge the validity of the draft board order, in defense to the indictment charging him with refusal to submit to induction, was a denial of a judicial trial contrary to the due process clause of the First Amendment to, and the bill-of-attainder clause of, the Constitution so as to make the judgment of conviction subject to collateral attack on a writ of habeas corpus, irrespective of the validity of the draft board proceedings	13
TWO—Even assuming that petitioner's right to release upon the writ of habeas corpus is dependent exclusively upon the invalidity of administrative proceedings, the undisputed evidence shows that the draft boards arbitrarily and capriciously denied him his claim for exemption from training and service as a minister of religion and that the classification given him was without basis in fact; accordingly, the order supporting his indictment was void	28
Conclusion	34

Cases Cited

Adams v. United States ex rel. McCann 317 U. S. 269	22
Albert v. Goguen 141 F. 2d 302 (CCA-1)	14
Bain, Ex parte 121 U. S. 1 (1887)	11, 21
Baker v. Baker Eccles & Co. 242 U. S. 394, 401	10, 18
Bowen v. Johnston 306 U. S. 19, 23-25, 26, 27	10, 14, 1[illegible]

CASES CITED *continued*

PAGE

Bradstreet v. Neptune
3 Sumn. (U. S.) 600 ..... 17, 18

Burns v. Carrollton
— Ga. App. —, 34 S. E. 2d 621 33

Cain, Ex parte
39 Ala. 440-441 30

Callan v. Wilson
127 U. S. 540 ..... 11, 22

Chicago M. & S. P. R. v. Minnesota
134 U. S. 418, 456-457 17

Clowans v. Rives
104 F. 2d 240 21

Commonwealth v. Akmakjian
316 Mass. 97, 55 N. E. 2d 6 33

Commonwealth v. Richardson
313 Mass. 632, 638 33

Cummings v. Missouri
4 Wall. 277, 320-332 ..... 17, 18

Diaz v. United States
223 U. S. 442 20

Donley v. Colorado Springs
40 F. Supp. 15 33

Dowell v. United States
221 U. S. 325, 330 20

Edwards v. United States
312 U. S. 473 20

Estep v. United States
No. 293 Oct. T. 1945:
Petitioner's Joint Brief, pp. 131-190 33
Slip opinion, p. 7, note 15 15
— U. S. —, 66 S. Ct. 423, 428 (note 17), 429-433 ..... 13, 14, 15, 17, 25

Follett v. McCormick
321 U. S. 573 32

Frank v. Mangum
237 U. S. 309, 330-331, 335-347 ..... 11, 21

Griffin v. Griffin
— U. S. —, 66 S. Ct. 556 ..... 10, 18

Hawk, Ex parte
321 U. S. 114 14

Helvering v. Bliss
293 U. S. 144 29

House v. Mayo
324 U. S. 45 15

Hovey v. Elliott
167 U. S. 409, 413-415, 417-418 ..... 10, 17, 18, 19

	PAGE
Johnson v. Zerbst 304 U. S. 458, 463, 468	10, 11, 16, 17, 22
Jones v. Huff 152 F. 2d 14 (App. D. C.)	17
Jones v. Kentucky 97 F. 2d 335 (1938, CCA-6)	21
Jones v. Moultrie — Ga. App. —, 33 S. E. 2d 561	33
Kentucky v. Jones 10 Bush (70 Ky.) 725	18
Lisemba v. California 314 U. S. 219, 236	20
Manning v. Biddle 14 F. 2d 518, 519 (CCA-8)	22
McVeigh v. United States 11 Wall. 259, 261, 267-268	10, 17, 18, 19
Moore v. Dempsey 261 U. S. 81, 86, 88, 91	11, 21
Murdock v. Pennsylvania 319 U. S. 105	32
National Exchange Bank v. Wiley 195 U. S. 257	18
Nielsen, Hans, Ex parte 131 U. S. 176, 184-185 (1889)	10, 21
Old Wayne Life Ass'n v. McDonough 204 U. S. 8, 23	10, 18
Ong Chang Wing v. United States 218 U. S. 272, 279	17, 19
Potter v. Dowd 146 F. 2d 244 (CCA-7)	22
Rea v. McDonald 153 F. 2d 190 (CCA-5) cert. denied March 25, 1946, 66 S. Ct 820; rehearing denied April 22, 1946, 66 S. Ct. 959	1, 10, 15
Rinko v. United States 147 F. 2d 1 (CCA-7) cert. denied 325 U. S. 851, 894	15
Rogers v. Peck 199 U. S. 425, 435	19
Rossier, In re 76 U. S. App. 214, 133 F. 2d 316, 322-324	17
Screws v. United States 325 U. S. 91	23
Semansky v. Stark 196 La. 307, 199 S. 129	33
Shreveport v. Teague 200 La. 679, 8 S. 2d 640	33
Siebold, Ex parte 100 U. S. 371, 375	16
Smith v. O'Grady 312 U. S. 329, 333	21

PAGE

Smith v. United States
148 F. 2d 288 (CCA-4) 25
66 Oct. T. 1945, Petitioner's Joint Brief, pp. 131-190 33
— U. S. —, 66 S. Ct. 423, 429 ..... 15, 26

State v. Meredith
197 S. C. 351, 15 S. E. 2d 678 33

Swaczyk v. United States
156 F. 2d 17 (CCA-1) decided June 13, 1946, pending on petition for writ of certiorari, No. 290 Oct. T. 1946: Petition for writ of certiorari, pp. 21-41 38

Thomas v. Atlanta
59 Ga. App. 520, 1 S. E. 2d 598 33

Trinidad v. Sagrada Orden, etc.
263 U. S. 578 29

United States v. Lovett
— U. S. —, 66 S. Ct. 1073 18

United States ex rel. Arpaia v. Alexander
146 F. 2d 847 (CCA-2) 13, 14

United States ex rel. Falbo v. Kennedy
141 F. 2d 689 (CCA-4) cert. denied 322 U. S. 745 ..... 13, 14

United States ex rel. Hall v. Stalter
151 F. 2d 633 (CCA-7) 11, 32

United States ex rel. Lohrberg v. Nicholson
141 F. 2d 689 (CCA-4) cert. denied 322 U. S. 744 ..... 13, 14

United States ex rel. McCann v. Adams
320 U. S. 220, 221 22

United States ex rel. Trainin v. Cain
144 F. 2d 944 (CCA-2) 17

Waley v. Johnston
316 U. S. 101, 104-105 ..... 10-11, 21, 23

Walker v. Johnston
312 U. S. 275, 286 ..... 11, 22

Williams, Ex parte
317 U. S. 604 14

Williams v. Kaiser
323 U. S. 471, 477, 485 16

Wilson, Ex parte
114 U. S. 417 (1885) 11, 21

Windsor v. McVeigh
93 U. S. 274, 277, 278-279 ..... 10, 17, 18

Wong Wing v. United States
163 U. S. 228 20

Statutes Cited

	PAGE
Judicial Code, Sec. 240 (a), as amended by Act of Feb. 13, 1925	2, 34
Rules, Supreme Court of the United States, Rule 38	2, 34
United States Code:	
Title 28, secs. 451-464 ["Habeas Corpus Act"]	2
Title 50, App. secs. 301-318 ["Selective Training and Service Act of 1940" as amended, sections 3 (a), 5(d), 10 (a), 11]	2, 5, 10
United States Constitution	
Article I, sec. 9, clause 2	2
Article I, sec. 9, clause 3	2, 3, 4, 8, 13, 17
Article III, sec. 2, clauses 1-3	2, 17
Amendment I	13
Amendment V	2, 3, 4, 8, 11, 17
Amendment VI	2, 3

Selective Service Material Cited

Opinion No. 14, National Headquarters, Selective Service System, June 12, 1941, amended Nov. 2, 1942	28
Regulations, Selective Service (32 C. F. R. Supp. 615.81 et seq.) sections—	
615.81	2
615.82	2
622.44	2, 31
622.51	2
623.1	2
623.2	2
623.21	2
623.61	2
625.1	2
625.2	2
629.1-629.35	2
633.2	2
633.21	2
642.41	2
642.42	2
Selective Service in Wartime, Second Report of Director of Selective Service 1941-42 (Government Printing Office, Washington) pp. 230-241	28
State Director Advice 213-B, June 7, 1944, amended Sept. 25, 1944	28

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

□

THEODORE MARTIN SUNAL, *Petitioner*

v.

DAVID R. LARGE, SUPERINTENDENT
FEDERAL PRISON CAMP
MILL POINT, W. VA.
Respondent

□

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

Theodore Martin Sunal petitions this Court for a writ of certiorari. He shows unto the Court as follows:

Summary of Matters Involved

1. *Preliminary Statement.*

The denial of certiorari by this Court in *Rea* v. *McDonald*, 66 S. Ct. 820, does not foreclose the questions presented here. Although the facts are identical, the conclusions in the two cases are different. In the *Rea* case, the court of appeals (153 F. 2d 190) held that the writ of habeas corpus was not available. The court below held that the writ of habeas corpus was an available remedy. [102, 104-107]* Then the court below held that the prisoner was

* Bracketed figures appearing in this petition and the supporting brief refer to pages of separately-bound printed appendix.

properly remanded in spite of the alleged denial of constitutional rights because petitioner was liable for training and service as charged in the indictment. [109]

2. *Opinion of the court below.*

The opinion of the United States Circuit Court of Appeals is not yet reported in the Federal Reporter, but appears in the record. [102-118]

3. *Jurisdiction.*

Jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule 38 of the Revised Rules of the Supreme Court of the United States.

4. *Timeliness of this petition.*

The judgment of the Circuit Court of Appeals was rendered and entered on July 29, 1946. [118-119] The petition for writ of certiorari is filed within three months from that date.

5. *Statutes and Regulations involved.*

Scope and effect of the Habeas Corpus Act (28 U. S. C. secs. 451-464) are involved. Also drawn in question is the construction and application of the Selective Training and Service Act of 1940, as amended, sections 3 (a), 5 (d), 10 (a), and 11 (50 U. S. C. App. secs. 301-318). Also involved are the Selective Service Regulations, sections 615.81 (a), 615.82, 622.44, 622.51, 623.1, 623.2, 623.21, 623.61, 625.1, 625.2, 629.1-629.35, 633.2, 633.21, 642.41, and 642.42 (32 C. F. R. Supp. 601.5 *et seq.*) promulgated by the President under said Act.

6. *Constitutional provisions involved.*

Clause 2 of Section 9 of Article I concerning the writ of habeas corpus is involved. Clause 3 of Section 9 of Article I prohibiting bills of attainder is invoked. Clauses 1-3 in Section 2 of Article III, investing the judicial powers, and the Fifth and Sixth Amendments are relied upon.

Questions Presented

1. Did refusal of the convicting court to permit petitioner to attack the validity of the draft-board order supporting the indictment constitute a denial of a judicial trial to petitioner, contrary to the due-process and bill-of-attainder clauses of the Constitution, so as to make the judgment of conviction subject to collateral attack upon writ of habeas corpus?

2. Did the courts below, after holding that denial of the right to challenge the validity of the draft-board order by the convicting court was sufficient ground for granting the writ of habeas corpus, err in remanding petitioner because, after review of the proceedings in the convicting court, they were of the opinion that there was basis in fact for the draft-board order which, in their opinion, was valid?

3. Upon the hearing of a writ of habeas corpus to determine the validity of restraint of one held under conviction on account of refusal to submit to induction as ordered by a draft board, because of refusal of convicting court to permit the prisoner to challenge the validity of the draft-board order, is the issue confined to the validity of the draft-board proceedings?

4. Upon the hearing of a writ of habeas corpus to determine the validity of restraint of one held under conviction on account of refusal to submit to induction as ordered by a draft board, because of refusal of convicting court to permit the prisoner to challenge the validity of the draft-board order, is the error of the convicting court cured through a finding of the habeas corpus court that the draft-board proceedings sustaining the jurisdiction of the convicting court are valid?

5. May petitioner, by writ of habeas corpus, collaterally attack the conviction for refusal to submit to induction on the ground that the convicting court denied him the right to challenge the validity of the draft-board order, contrary to the due-process and bill-of-attainder clauses of the Constitution, irrespective of the validity of the draft-board order?

6. Is the denial of the right to challenge the validity of a draft-board order in petitioner's defense against the indictment charging him with refusal to submit to induction, reviewable only on direct appeal from the judgment of conviction and not collaterally by writ of habeas corpus?

7. Did the courts below err in holding that the draft-board determination supporting the conviction of petitioner had basis in fact, was not issued in excess of authority, contrary to law, arbitrarily and capriciously, and contrary to the due process clause of the Fifth Amendment to the Constitution, since the undisputed evidence showed that petitioner was an ordained minister of religion, exempt from all training and service under the Act?

Statement of Case

FORM AND HISTORY OF ACTION

This civil action was begun by filing a petition for writ of habeas corpus in the name of the United States of America upon the relation of Rudolph J. Sunal. It was alleged that the petitioner was illegally restrained of his liberty under a judgment and commitment of the United States District Court for the Western District of Pennsylvania based upon an indictment charging petitioner with an alleged violation of the Selective Training and Service Act of 1940, as amended, by refusal to submit to induction into the armed forces after reporting at the induction station pursuant to the order of the Selective Service board. [1-20]

The district court issued the writ of habeas corpus. [20] The warden, respondent, filed his return, together with a demurrer and motion to dismiss. [21-27] Evidence was received. [84-94] The case was argued, at the conclusion of which the court discharged the writ of habeas corpus and remanded petitioner to the custody of respondent. [98-99] Thereupon application was made to have petitioner admitted to bail pending a disposition of this appeal. [98] Bail was allowed because of substantial questions that should be decided by this court upon appeal. [99] The court entered findings of fact and conclusions of law, as well as the judgment. [96-98] Notice of appeal and bond were duly filed.

FACTS

Petitioner duly registered under the Selective Training and Service Act of 1940 with Local Board No. 26, at Pittsburgh, Pennsylvania. In the Selective Service questionnaire, he did not fill in Series VIII in reference to the claim for exemption as a minister of religion. [30] Later

on he filed a number of papers explaining why he did not fill out this portion of the questionnaire. [37-83] Moreover, he filed evidence showing that he was regularly engaged as a minister of religion. [42-45, 63-65, 67-69, 73] At the time his first classification was given he was a part-time minister of Jehovah's witnesses. On July 1, 1941, the local board placed him in Class I-A. [31] He appealed and was classified as a conscientious objector, Class IV-E, making him liable for training and service in a Civilian Public Service Camp. [31] He failed to report for work of national importance. [4] He was indicted, tried and sentenced to a term of two years. [4] He served this sentence. Thereafter petitioner entered the full-time pioneer missionary ministry upon release from prison, and engaged therein for approximately one year before he was again classified. In such full-time ministry, he devoted an average of 150 hours monthly to his actual ministerial work. He did part-time secular work, spending approximately three hours or four hours daily to the performance of duties in his secular work. [4, 5] The secular work did not interfere with his full-time ministerial work. [5] He was recognized by scores of people* who filed affidavits and petitions with his draft board showing that they recognized him as standing in relation to Jehovah's witnesses in the same manner as do regular and duly ordained ministers. [51-66] He was looked upon by Jehovah's witnesses and other persons as having the same position toward Jehovah's witnesses as do the ministers of the orthodox religious denominations toward their congregations. [51-66] Moreover his draft board file

* Affidavits and petitions were signed by 103 persons. Before the hearing officer of the Department of Justice eighteen persons appeared who testified concerning his ministerial activity. The entire draft board file which was received in evidence by the court below is not being printed in its entirety because of the expense involved. The file is very voluminous. Only portions thereof have been printed as part of Appendix. [37-83] The court is referred to the draft board file, however, which is among the exhibits filed with the Clerk of this Court.

showed that he regularly performed ceremonies and duties that are customarily performed by orthodox clergy. [67-73] There was no evidence in the file to show that he was not regularly teaching and preaching as a full-time minister of the Watchtower Bible and Tract Society and Jehovah's witnesses, duly recognized religious organizations under the Act. [67-73] In spite of the undisputed evidence showing that at the time of his classification he was a minister of religion his local board on May 20, 1944, placed him in Class I-A making him liable for training and service in the armed forces. [32] He requested a personal appearance before the local board, which was granted. [32, 49-50] His claim for exemption as a minister was again denied and his classification continued. [78-79] He appealed to the board of appeal which affirmed his I-A classification. [32-33, 67-77] In due course he was ordered to report for induction. [5-6, 33] He responded to the order, reported at the induction station and completed the selective process. [5-6, 33] After he was accepted, following his final physical examination, he refused to step forward and submit to induction as a part of the induction ceremony. [6, 33] He was released by the armed forces, arrested and charged with an alleged violation of the Selective Training and Service Act. [6, 33]

Petitioner pleaded not guilty to the indictment charging him with refusal to submit to induction. [10, 33] On the trial to a jury he offered in evidence his entire draft board file. He offered other evidence in the form of *de novo* testimony. [10-11] All the evidence was offered for the purpose of establishing that the Selective Service System acted illegally, in excess of its authority, without due process of law and arbitrarily and capriciously denying him his claim for exemption as a minister of religion. [10-11] The trial court refused to admit such evidence, to which exception was taken. [11-12] The judge instructed the jury that the draft board classification could not be attacked in defense to the indictment. [11] Petitioner excepted to

this. [11] The jury returned a verdict of guilty. [12] Petitioner was sentenced to serve five years in the custody of the attorney general. [12] No appeal being taken from such judgment, he was committed to the custody of the warden of the Federal Prison Camp located at Mill Point, West Virginia. [98]

How Issues Raised

The issues were raised by the petition for writ of habeas corpus, the return of the warden and the order of the court below. [1-17, 23-27, 98-99, 103] In the petition for writ of habeas corpus, petitioner contended that upon the trial of the indictment before the jury in the District Court for the Western District of Pennsylvania, he was denied his constitutional right of a fair trial and the right to be heard in his defense, contrary to the Constitution. [2-3] It was contended that the convicting court denied him due process of law by holding that he was not entitled to challenge the validity of the order commanding him to submit to induction, and in refusing him the right to offer evidence to show the invalidity of the order. [11] By reason of this action of the convicting court, it was claimed that he was penalized contrary to the due process clause and being denied his defense to the indictment. [11-12] It was contended that the court transferred the judicial power of the court to the draft board, denying him his right of trial by jury, refusing him the right to a judicial trial and abridging his liberty, contrary to the due process clause of the Fifth Amendment to the United States Constitution. [12] Moreover, it was alleged that the Act and Regulations had been transformed into a bill of attainder, contrary to Clause 3, Section 9 of Article I of the United States Constitution. [12]

The courts below held that the holding and action of the convicting court was grounds for discharge upon a petition

for writ of habeas corpus providing the draft board file showed that petitioner was arbitrarily and capriciously classified and illegally deprived of his rights under the Act and Regulations by the Selective Service System. [88-89, 107] However, the courts below held that the holding and action of the convicting court was harmless error and not grounds for the discharge of petitioner because the draft board record contained evidence on which the draft boards were justified in placing petitioner in Class I-A and denying his claim for exemption as a minister of religion. [89, 92, 96, 109, 112-115] The basis for this conclusion was that because petitioner devoted part of his time to the performance of secular work, he could not complain of the action of the draft board in rejecting his claim for exemption as a minister. [90, 92-93, 115-117] The courts concluded that the action of the draft boards in denying petitioner the ministerial classification and in classifying him as liable for training and service was not a denial of due process of law and was not arbitrary or capricious. [93, 96-97, 113, 115-116] The courts below held that the action of the convicting court in rejecting the evidence and in charging the jury was not a denial of due process of law. [96-97, 109, 112] The courts below declared that the imprisonment of petitioner was lawful and that he was not entitled to a discharge from custody. [97, 118]

Specification of Error

The courts below erred in remanding petitioner to custody and holding that his detention was valid.

Reasons Relied on for Granting Writ

The holding of the court below that the writ of habeas corpus was available to determine the legality of detention of one convicted for refusal to submit to induction in violation of the Selective Training and Service Act is in direct conflict with the holding of the United States Circuit Court of Appeals for the Fifth Circuit in *Rea* v. *McDonald*, 153 F. 2d 190.

The holding of the court below that the denial to one charged with refusal to submit to induction of his right to challenge the validity of the draft board order did not constitute a denial of procedural due process of law and of a judicial trial so as to make the judgment subject to collateral attack is in direct conflict with applicable decisions of this Court. *McVeigh* v. *United States*, 11 Wall. 259, 261, 267-268; *Windsor* v. *McVeigh*, 93 U.S. 274, 277, 278-279; *Hovey* v. *Elliott*, 167 U. S. 409, 413-415, 417-418; *Old Wayne Life Ass'n* v. *McDonough*, 204 U.S. 8, 23; *Baker* v. *Baker Eccles & Co.*, 242 U. S. 394, 401; *Griffin* v. *Griffin*, 66 S. Ct. 556.

The holding of the court below that the denial to petitioner of his right to challenge the validity of the draft board order in response to the indictment charging him with refusal to submit to induction did not constitute an ouster of jurisdiction so as to make the judgment of conviction subject to collateral attack by writ of habeas corpus is in direct conflict with applicable decisions of this Court. *Johnson* v. *Zerbst*, 304 U. S. 458; *Bowen* v. *Johnston*, 306 U. S. 19, 23-25.

The holding of the court below that the denial of the constitutional right to defend the indictment on the ground that the draft board order was invalid is reviewable only upon direct appeal and not collaterally by habeas corpus is in direct conflict with applicable decisions of this court. *Ex parte Hans Nielsen* (1889) 131 U. S. 176, 184-185; *Waley*

v. *Johnston*, 316 U. S. 101; *Frank* v. *Mangum*, 237 U. S. 309, 330-331, 335; *Moore* v. *Dempsey*, 261 U. S. 81, 91; *Ex parte Wilson* (1885) 114 U. S. 417; *Ex parte Bain* (1887) 121 U. S. 1; *Callan* v. *Wilson*, 127 U. S. 540; *Johnson* v. *Zerbst*, 304 U. S. 458; *Walker* v. *Johnston*, 312 U. S. 275.

The holding of the court below that the determination of the draft boards and the order supporting the indictment were valid and had basis in fact and that the petitioner was not arbitrarily and capriciously denied his claim for exemption is in direct conflict with the holding of the United States Circuit Court of Appeals for the Seventh Circuit in the case of *United States ex rel. Hull* v. *Stalter*, 151 F. 2d 633, where the facts before the draft board were substantially the same as here. There the court held that the draft board determination and order were contrary to the due process clause of the Fifth Amendment.

In addition to the fact that the holding of the court below is in conflict with applicable decisions of this Court, the petitioner claims, for additional grounds supporting the granting of the writ, that the court below has decided important questions of federal law which have not been, but should be, settled by this Court. Moreover, the court below has so far departed from the accepted and usual course of judicial proceedings in habeas corpus cases and has also sanctioned such departure by the district court, as to call for an exercise of this Court's power of supervision.

WHEREFORE your petitioner prays that this Court exercise its discretion by directing the issuance of a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit, directing such court to certify to this Court for review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the order of the Circuit Court of Appeals, affirming the judgment of the district court, be here set aside and held for naught; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper under the circumstances.

THEODORE MARTIN SUNAL, *Petitioner*

By HAYDEN C. COVINGTON, *his Counsel*

SUPPORTING BRIEF

Preliminary

For a statement as to the opinion of the court below, the basis on which the jurisdiction of this court is claimed, the questions presented, the history of the action, how the issues were raised, the evidence received and rejected and the error relied upon, reference is here made to the foregoing petition for writ of certiorari.

ARGUMENT

ONE

Refusal by the sentencing court to permit petitioner to challenge the validity of the draft board order, in defense to the indictment charging him with refusal to submit to induction, was a denial of a judicial trial contrary to the due process clause of the First Amendment to, and the bill-of-attainder clause of the Constitution, so as to make the judgment of conviction subject to collateral attack on a writ of habeas corpus, irrespective of the validity of the draft board proceedings.

The decisions in *United States ex rel. Lohrberg* v. *Nicholson* (CCA-4) 141 F. 2d 689 (certiorari denied 322 U. S. 744), *United States ex rel. Falb* v. *Kennedy* (CCA-4) 141 F. 2d 689 (certiorari denied 322 U. S. 745), and *United States ex rel. Arpaia* v. *Alexander* (CCA-2) 146 F. 2d 847 * are not apposite. In each of those cases the prisoner had not completed the selective process. The failure of each to report for and submit to a preinduction physical examination prevented the armed forces from determining

* See Note 17 of the majority opinion written by Mr. Justice Douglas in Estep v. United States, 66 S. Ct. 423, 428.

whether he was acceptable for training and service through the screening process. None of those registrants had reached the point in the administrative process which qualified them to challenge the legality of the administrative orders. Since petitioner had completed the selective process upon reporting for induction he is in a position to challenge the administrative orders in defense to the indictment charging him with refusal to submit to induction. The denial of this right by the convicting court entitles him to the writ of habeas corpus.

Mr. Justice Douglas, speaking for the court in *Estep* v. *United States* (66 S. Ct. 423, 428), recognizes that there is a distinction between the situation presented in the *Lohrberg, Falbo* and *Arpaia* cases, supra, and that presented upon a petition for habeas corpus where the prisoner had exhausted the selective process. In footnote 17 of the *Estep* opinion (pp. 428-429) he declares that, "It is true that after the conviction of the defendant in the *Falbo* case, his petition for a writ of habeas corpus was denied. *United States ex rel. Falbo* v. *Kennedy*, 4 Cir., 141 F. 2d 689. And in a like situation habeas corpus was denied in advance of the trial. *Albert* v. *Goguen*, 1 Cir., 141 F. 2d 302. But in those cases additional steps in the selective service procedure remained to be taken. Denial of habeas corpus followed by analogy to the familiar situations where other corrective procedures had been available which might have afforded relief from the orders complained of. See *Bowen* v. *Johnston*, 306 U. S. 19, 59 S. Ct. 442, 83 L. Ed. 455; *Ex parte Williams*, 317 U. S. 604, 63 S. Ct. 431, 87 L. Ed. 491; *Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572. But in the present cases the registrants, as we have said, had pursued their administrative remedies to the end."

In petitioner's case here no additional step in the selective process remained to be taken. There was no other "corrective procedure" available to petitioner "which might

have afforded relief from the orders complained of." He pursued the selective process to the very end as did Estep in the case of *Estep* v. *United States*, 66 S. Ct. 423.

The court below was correct in refusing to follow the opinion of the United States Circuit Court of Appeals for the Fifth Circuit in *Rea* v. *McDonald*, 153 F. 2d 190, cert. den. 66 S. Ct. 820, rehearing den. 66 S. Ct. 959.

The same ground for denial of petition for writ of habeas corpus was urged in the case of *House* v. *Mayo*, 324 U. S. 45. This Court, concerning its previous denial for writ of certiorari in that case, said:

"The district court also referred to a denial by this court of a petition for certiorari, filed here after the denial by the Florida Supreme Court of one of the applications for habeas corpus. See *House* v. *Mayo*, 322 U. S. 710, 64 S. Ct. 1058. The district court thought that this was an expression 'of the opinion that no meritorious question is presented by the matters of which petitioner here complains.' But as we have often said, a denial of certiorari by this court imports no expression of opinion upon the merits of a case. See *Hamilton-Brown Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251, 258, 36 S. Ct. 269, 271, 60 L. Ed. 629; *State of Ohio ex rel. Seney* v. *Swift & Co.*, 260 U. S. 146, 151, 43 S. Ct. 22, 24, 67 L. Ed. 176; *United States* v. *Carver*, 260 U. S. 482, 490, 43 S. Ct. 181, 182, 67 L. Ed. 361; *Atlantic Coast L. Ry.* v. *Powe*, 283 U. S. 401, 403, 404, 51 S. Ct. 489, 499, 75 L. Ed. 1142."

In further support of the fact that the denial of certiorari in the *Rea* case, *supra*, should not be accepted as ground for denial of the questions presented here, it should be observed that the questions presented in the cases of *Estep* v. *United States*, and *Smith* v. *United States*, 66 S. Ct. 423, were previously presented to the court in *Rinko* v. *United States*, 147 F. 2d 1. Petition for certiorari was denied, 325 U. S. 851, 894. See also note 15, *Estep* v. *United States*, *supra*.

The principles announced in *Bowen* v. *Johnston,* 306 U. S. 19, are applicable here. There it was stated that if the absence of jurisdiction appeared on the face of the record made in the trial court upon the trial of the indictment, it would be reviewable on a writ of habeas corpus. (*Ibid.* p. 26) In that decision it was also said that the general rule, that habeas corpus is not available where the question could be raised upon appeal, is "not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." (*Ibid.* p. 27) In the case at bar there was such uncertainty and doubt and confusion at the time of the trial by the district court in Pennsylvania as to the availability of the defense to the indictment that such presents unusual circumstances warranting the writ of habeas corpus. (*Ibid.* p. 27)

In *Johnson* v. *Zerbst,* 304 U. S. 458, the court announced a principle and made a holding that is a precedent for the action petitioner requests here. In that decision it is said: "A court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who had not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus. A judge of the United States—to whom a petition for habeas corpus is addressed—should be alert to examine 'the facts for himself when, if true as alleged, they make the trial absolutely void.'" (*Ibid.* 468) See also *Williams* v. *Kaiser,* 323 U. S. 471, 477; *Bowen* v. *Johnston,* 306 U. S. 19, 23-25; *Ex parte Siebold,* 100 U. S. 371, 375.

The denial of petitioner's constitutional right to attack the draft board order contrary to the express commands of the fundamental compact is such an error that is not only reviewable upon appeal but is also subject to review and collateral attack upon a petition for writ of habeas corpus.

If a federal judge of a district court refuses to conduct a judicial trial, as did the judge of the convicting court in the case at bar, and proceeds to cut out the only defense and try the case by illegal theory similar to "trial by ordeal", in violation of the due process clause of the Fifth Amendment, Clause 3 in Section 9 of Article I, prohibiting bills of attainder, and Article III investing the judicial powers in the courts and not in administrative agencies, then such federal court *loses jurisdiction* or is ousted of jurisdiction to proceed further and pronounce sentence against petitioner. *Johnson* v. *Zerbst,* 304 U. S. 458, 468. See also *In re Rosier,* 76 U. S. App. 214, 133 F. 2d 316, 322-324, and *Jones* v. *Huff* (App. D. C.) 152 F. 2d 14.

It has been uniformly held that to deny a defendant in a criminal or civil case the right to be heard and to make his defenses is a rank denial of procedural due process of law. *McVeigh* v. *United States,* 11 Wall. 259, 261, 267-268; *Windsor* v. *McVeigh,* 93 U. S. 274, 277, 278-279; *Hovey* v. *Elliott,* 167 U. S. 409, 413-415, 417-418; *Bradstreet* v. *Neptune,* 3 Sumn. (U. S.) 600; *Ong Chang Wing* v. *United States,* 218 U. S. 272, 279; *Chicago M. & S. P. R.* v. *Minnesota,* 134 U. S. 418, 456-457; *United States ex rel. Trainin* v. *Cain* (CCA-2) 144 F. 2d 944; *Estep* v. *United States,* 66 S. Ct. 423, 429-433, concurring opinion of Mr. Justice Murphy.

Moreover, to deny one the right to be heard in his defense to a criminal charge is to deny a judicial trial contrary to the bill-of-attainder clause of the United States Constitution, in addition to amounting to a denial of procedural due process of law. *Cummings* v. *Missouri,* 4 Wall.

277, 320-332; *Kentucky* v. *Jones*, 10 Bush. (70 Ky.) 725; *United States* v. *Lovett*, 66 S. Ct. 1073. A judgment rendered upon a trial where there has been a denial of a fundamental constitutional right or due process of procedural law is a nullity and subject to collateral attack, including attack by habeas corpus. *National Exchange Bank* v. *Wiley*, 195 U. S. 257; *Old Wayne Life Ass'n* v. *McDonough*, 204 U. S. 8, 23; *Baker* v. *Baker Eccles & Co.*, 242 U. S. 394, 401; *Griffin* v. *Griffin*, 66 S. Ct. 556.

The doctrine of denial of defenses because of contempt of the law and flouting of the orders of administrative and judicial officers has never been approved by the courts. In *Hovey* v. *Elliott*, 167 U. S. 409, 413-415, 417-418, the court held subject to collateral attack a judgment where the answer of the defendant had been stricken because of contempt of court. The court held that the entry of the judgment without affording an opportunity to defend was a violation of the citizen's rights of due process.

The right to attack an administrative order on the ground of its illegality, in defense to an indictment, is supported by *Windsor* v. *McVeigh*, 93 U. S. 274, 277-278. There it was said: "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations." See also *McVeigh* v. *United States*, 11 Wall. 259, 267; *Bradstreet* v. *Neptune*, 3 Sumn. (U. S.) 600, where it is said: "It is as old as the law and never more to be respected than now, that no one shall be personally bound until he has had his day in court; by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression and never can be upheld where justice is justly administered."

In *McVeigh* v. *United States,* 11 Wall. 259, 267, the court said that when one is assailed by an indictment or proceeding in the United States District Courts "he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the right principles of the social compact and of the right administration of justice."

In *Rogers* v. *Peck,* 199 U. S. 425, 435, the court said that a defendant in a criminal case must be given an adequate and full opportunity to be heard in defense to an indictment.

In *Ong Chang Wing* v. *United States,* 218 U. S. 272, 279, it is said: "This court has had frequent occasion to consider the requirements of due process of law to criminal procedure, and, generally speaking, it may be said that if an accused has been heard in a court of competent jurisdiction, . . . with an opportunity to be heard, . . . then he has had due process of law."

The construction of the Act so as to deny judicial review of administrative action, which concededly is available upon petition for writ of habeas corpus, is a rank denial of due process of law and of the right to be heard in one's defense. *Hovey* v. *Elliott,* 167 U. S. 409, 413-418: "[A] more fundamental question yet remains to be determined, that is, whether a court possessing plenary power to punish for contempt, unlimited by statute, has the right to summon a defendant to answer, and then, after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. . . . Can it be doubted that due process of law

signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever to be heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and foundation of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution?"

In *Edwards* v. *United States*, 312 U. S. 473, the court held that the striking of a plea in bar because it was unmeritorious and could not be sustained in law or fact was a denial of due process and constituted reversible error.

The court, in *Dowell* v. *United States*, 221 U. S. 325, 330, held that an act whereby an administrative agency determined the facts of one's duty and the circumstances of his violation thereof, without an opportunity to be heard in his defense in court, was unconstitutional. Speaking of the constitutional provisions the court said: "It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witnesses in the exercise of the right of cross examination."

In *Wong Wing* v. *United States*, 163 U. S. 228, the statute that permitted the immigration officer to exclude the alien by order rendered under administrative power, also allowed him the right to impose a penalty and punishment in addition. The law was declared invalid. The court said: "It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents." See also *Diaz* v. *United States*, 223 U. S. 442; *Lisemba* v. *California*, 314 U. S. 219, 236.

The fact that the writ of habeas corpus has been broad-

ened so as to reach many different types of violations of procedural due process impels the conclusion that refusing petitioner the right to attack the draft board order is a denial of a judicial trial contrary to the due process clause and is equally subject to attack by habeas corpus, which penetrates and goes behind the judgment and reviews the substance of the matter, either on the record or *de hors* the record, regardless of whether there has been an appeal or failure to take an appeal. The following types of errors and inquiries inflicted contrary to the Constitution have been, among many others, reviewed upon the writ of habeas corpus, although the questions could have been raised upon appeal:

(1) Erroneous denial of a plea of former jeopardy. *Ex parte Hans Nielsen* (1889) 131 U. S. 176, 184-185; *Clowans* v. *Rives*, 104 F. 2d 240.

(2) Erroneous reception into evidence a confession obtained in violation of the due process clause by force, etc. *Jones* v. *Kentucky* (CCA-6) (1938) 97 F. 2d 335.

(3) Illegal forcing or obtaining a plea of guilty. *Waley* v. *Johnston*, 316 U. S. 101; *Smith* v. *O'Grady*, 312 U. S. 329.

(4) Proceeding to judgment of guilty after trial dominated by mob violence which could have been complained of at trial and raised on appeal. *Frank* v. *Mangum*, 237 U. S. 309, 330-331, 335; *Moore* v. *Dempsey*, 261 U. S. 86, 91.

(5) Trial by information for a felony contrary to the Constitution, which could have been raised upon appeal. *Ex parte Wilson* (1885) 114 U. S. 417; *Ex parte Bain* (1887) 121 U. S. 1, in which latter case the indictment was amended, without return to grand jury, by the prosecutor.

(6) Denial of trial by jury which should and could have been raised on appeal. *Callan* v. *Wilson*, 127 U. S. 540.

(7) Illegal denial of counsel which could have been raised upon appeal. *Johnson* v. *Zerbst*, 304 U. S. 458, 463, 468; *Walker* v. *Johnston*, 312 U. S. 275; *United States ex rel. McCann* v. *Adams*, 320 U. S. 220, 221; *Adams* v. *United States ex rel. McCann*, 317 U. S. 269.

The denial of the right to make any and all valid defenses upon a trial, such as refusing petitioner the right to attack the draft board order, is equal to, if not worse than, a denial of the right to have counsel. The Constitution guarantees both. Without the granting of either, upon request not waived as here, the trial court loses jurisdiction to pronounce sentence. The provisions of the Constitution guaranteeing a judicial trial are equally as strong and respectable as is the provision with reference to the right to have counsel. If a defendant is deprived of the right of counsel it does him no good to have a trial. If he is also deprived of a judicial trial and the right to be heard in his defenses that the draft board order was invalid, it does him no good to have counsel. If habeas corpus attack collaterally made can reach the denials of one it should reach the other because there is no difference between the two rights. Cf. *United States ex rel. McCann* v. *Adams*, supra; with *Adams* v. *United States ex rel. McCann*, supra. The decision of the United States Eighth Circuit Court of Appeals in *Manning* v. *Biddle*, 14 F. 2d 518, 519, is apposite here. Cf. *Potter* v. *Dowd* (CCA-7) 146 F. 2d 244.

Even assuming, *arguendo*, that petitioner had the opportunity of raising these objections in the Circuit Court

of Appeals on an appeal, yet he would not be precluded from raising constitutional questions upon his petition for writ of habeas corpus. Since the constitutional objections urged in the petition are so fundamental and of such great magnitude they cannot be waived by failure to object, even if petitioner was represented by counsel. If the questions are such that they can be considered on a petition for writ of habeas corpus, they cannot be waived even if petitioner had failed to submit to the sentence and had taken an appeal. *Screws* v. *United States,* 325 U. S. 91.

Similarly in *Waley* v. *Johnston,* 316 U. S. 101, the court extended the writ and broadened its scope in order to permit a full inquiry into facts entirely *de hors* the record to show the illegality of a plea of guilty, thus placing the plea on the same footing as a confession obtained in the same manner by force and duress. It was said (pp. 104-105): "In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. *It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.*" (Italics added)

The courts below held that the writ of habeas corpus was properly discharged because, upon the evidence, it appears that petitioner is not a minister of religion within the meaning of the Act and therefore the United States District Court for the Western District of Pennsylvania did not commit any prejudicial error against petitioner when the evidence appearing in the draft board file was excluded from consideration by the court and jury, or when the court instructed the jury that it could not consider the alleged illegality of the draft board determination. In other words, the courts below held that the alleged error

in denying petitioner due process of law was harmless error, because petitioner would not have been able to establish that he was a minister and that the draft board acted illegally, even if the convicting court had ruled properly. This holding of the courts below begs the question. It puts the cart before the horse. If there was denial of due process of law such denial cannot be cured by the finding of the courts below that petitioner is not a minister of religion. Suppose the convicting court had denied petitioner the right to counsel. Can it be reasonably said that such denial could be cured by a finding of the courts below that petitioner had no good defense to the indictment because his draft board file showed that he was not a minister of religion and was therefore guilty of failing to submit to induction? Suppose the court would have put him to trial upon an information rather than an indictment. Suppose the court erroneously overruled a plea of former jeopardy. Suppose petitioner was convicted upon a confession illegally obtained, contrary to the Constitution. Can it reasonably be said in any of these instances that the violation of the Constitution is harmless error because the draft board file showed that petitioner is not a minister and that he is guilty? The mere asking of these questions answers with a resounding NO. If petitioner was denied due process of law, as he claims, then there is only one method whereby that denial can be cured. That way is to discharge petitioner without prejudice to the rights of the Government to reindict and retry him, so that upon another trial he will have an opportunity to make his defenses. If one is denied the right of counsel, the right of trial by jury, or the right to trial under indictment contrary to the Constitution, such errors cannot be cured on the ground that they were harmless errors or that the petitioner is admittedly guilty, as the courts below held here.

The efforts of the courts below to hold that the action of Judge Schoonmaker at Erie, Pennsylvania, in refusing

to consider or to permit the jury to consider the illegality of the administrative action cannot succeed. A similar attempt was made by the court below in *Smith* v. *United States,* 148 F. 2d 288. See the last point discussed in that opinion. The *Smith* case was a companion case to the *Estep* case in this Court. This Court reversed the judgment in the *Smith* case because the trial court refused to exercise its judicial function. This Court did not consider the error harmless, as did the court below in its affirmance of the judgment. In the *Smith* case the trial court refused to permit the jury to pass upon the issues raised. In the *Smith* case the court limited determination of the issues to whether the defendant complied with the order. In this case the court trying the indictment limited the determination to whether the petitioner complied with the order to submit to induction. Moreover, in the *Smith* case, as well as in this case, the trial court did not pass upon the legality of the administrative determination.

If the courts below can pass upon the validity of the administrative determination after reviewing the draft board file, then the convicting court should have done so. Inasmuch as the convicting court failed to consider the legality of the administrative determination, and failed to permit the jury to determine the legality of the administrative action, the error, which is a denial of due process, cannot be cured by the rationalizing of the courts below in this case. In the same way, the error in the *Smith* case could not be cured by the rationalizing of the court below. *Smith* v. *United States,* 148 F. 2d 288; see last paragraph of opinion. The contrary view taken by this Court is best expressed by the last sentence of its opinion in the *Estep* and *Smith* cases (66 S. Ct. 423, 429): "Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case."

If this Court was of the opinion that the performance

of secular work by a minister of religion, or the failure of a minister to devote his full time (to the exclusion of all other activity) in the furtherance of ministerial work, would be ground for holding as harmless error the action of the trial court in excluding evidence and in holding that the jury could not consider the alleged illegality of the draft board action, it would have so held in the *Smith* case. It seems plain that if one is denied the right to make his defense that the action of the draft boards was illegal, such cannot be held harmless error because the courts below were of the opinion that the draft board did not err in making its classification. If such can be accomplished, then the denial of the right of trial by jury can be held to be harmless error by habeas corpus on the ground that the undisputed evidence shows that the defendant is guilty. The effort of the courts below to hold as harmless error the denial of due process by the United States District Court for the Western District of Pennsylvania is an effort to use habeas corpus inquiry into a trial *de novo* of the guilt or innocence of the petitioner.

Only one court has jurisdiction to determine the guilt or innocence of the petitioner under the indictment, and that is the United States District Court for the Western District of Pennsylvania. The failure of that court to exercise its judicial function does not authorize the courts below to reconsider the evidence *de novo* to determine whether or not petitioner is guilty. The convicting court having failed to exercise its function in this regard cannot be exonerated from the violation of the Constitution because the courts below saw fit to allow petitioner a full and fair trial on the alleged illegality of the administrative determination, while he was yet in prison and after his conviction.

The holding of the courts below that, although the writ of habeas corpus was available, the petitioner should be remanded because the draft board proceedings were found

to be valid, is an extraordinary departure from due process of law in habeas corpus cases. If this doctrine be sustained, then a new rule will have been grafted onto habeas corpus law which would defeat the very purpose of the writ. The judgment of conviction was invalid because of the denial of the right to be heard on the validity of the draft board determination. The denial of this right entitled petitioner to the writ of habeas corpus. The invalidity of the judgment, because of the denial of the right, cannot be validated by the habeas corpus court inquiring into the validity of the draft board proceedings. Once the judgment is invalid so as to justify the writ of habeas corpus the validity cannot be restored by the habeas corpus court performing the judicial function that the convicting court refused to perform. The novel method of disposing of the prisoner presents a threat to the inherent efficacy of the writ of habeas corpus. Such a rule would permit habeas corpus courts to inquire into the guilt or innocence of the prisoner for the purpose of determining the validity of his detention. This would enable habeas corpus courts to remand prisoners who have been denied constitutional rights on a finding that the denial of such rights was harmless error. Such a rule would enable judges of habeas corpus courts to nullify entirely the rights of prisoners under the writ.

TWO

Even assuming that petitioner's right to release upon the writ of habeas corpus is dependent exclusively upon the invalidity of administrative proceedings, the undisputed evidence shows that the draft boards arbitrarily and capriciously denied him his claim for exemption from training and service as a minister of religion and that the classification given him was without basis in fact; accordingly, the order supporting the indictment was void.

The holding of the court below that petitioner should be denied his release because the draft board did not violate the law, in denying him his claim for exemption as a minister of religion, again presents to this Court the necessity of expressing itself upon what is the meaning of the terms "regular minister of religion" or "duly ordained minister of religion" as used in the Act and Regulations.

Jehovah's witnesses have been declared to be a religious organization under the Act by the Selective Service System.* The draft boards and the lower federal courts have ignored the true facts in respect to the ministerial activity and status of Jehovah's witnesses. This has been done by arbitrarily and discriminatorily applying what constitutes a "minister of religion" according to the standards of the popular orthodox religious denominations to a basically different dissentient organization. The undisputed evidence in this case shows that Jehovah's witnesses are a society of missionary evangelists. The evidence showed without dispute that petitioner was engaged in the

* Selective Service National Headquarters: Opinion No. 14, June 12, 1941; Opinion No. 14 (amended) November 2, 1942; State Director Advice No. 213-B, June 7, 1944; State Director Advice No. 213-B (amended) September 25, 1944; *Selective Service in Wartime*, Second Report of Director of Selective Service 1941-1942, Government Printing Office, Washington 1943, pp. 239-241.

full-time missionary evangelistic work. He preached the gospel from house to house. Moreover, he delivered sermons at gatherings as do the orthodox clergy. In addition to this he preached in the homes of the people in the apostolic manner, serving a large congregation divided into several small groups in the homes of the people. The only difference between his method of preaching and that of the orthodox clergy was that he took the message to the people in their homes; the people did not come to him as do the members of the orthodox religious denominations. The undisputed evidence showed that his whole life was devoted to furtherance of the work of Jehovah's witnesses.

It is true that he performed secular work, devoting approximately 120 hours monthly. However, it should be remembered that this did not interfere with the performance of his duties as a full-time missionary evangelist. He spent an average of 150 hours monthly in missionary work. This was the quota established by the Watchtower Society for full-time pioneer missionary evangelists.

The court below held that petitioner was not a minister because he was not a "pastor" or "shepherd" of a congregation of laymen in the sense that the orthodox religious clergy are. The court below illegally and unlawfully construed the Act so as to include *only* ministers of the orthodox religious denominations and persons of other religious denominations who stand in the same relationship to their organizations "as do regularly ordained ministers of older and better known religious denominations." [117; see also 115-117]

In thus construing the Act, the court below placed a narrow strict interpretation upon the term "ordained minister" which is contrary to the policy of giving a broad and liberal interpretation to religious exemptions. *Trinidad* v. *Sagrada Orden de Predicatores de la Provincial del Santisimo Rosario de Filipinas,* 263 U. S. 578; *Helvering* v. *Bliss,* 293 U. S. 144.

Furthermore, such construction placed upon the Act is a perversion of the intent of Congress, by confining the exemption to some ministers of some religious organizations instead of to all ministers of all recognized churches and organizations. Also the interpretation placed upon the Act by the court below discriminated against Jehovah's witnesses in favor of "older and better known religious denominations". [117]

In giving such narrow interpretation to the Act and in declaring that petitioner was not entitled to the exemption [redacted] of his performance of part-time secular work [redacted] himself in the ministry, the court below erroneously [redacted] as a religious *hierarchy* and pronounced ecclesiastical anathema against petitioner, rather than applying the law of the land. This course of action taken by the court below is contrary to the spirit of fairness extended to all religious denominations by the courts in administering like exemption accorded ministers of religion in other statutes.

The arguments of the court below were rejected at an early day in this country by the Supreme Court of Alabama in construing the exemption provision of the conscription act of the Confederacy in the war between the States. The court said: "Neither this court, nor any other authority, judicial or executive, in this government, is a hierarchy, clothed with the power of determining the orthodoxy of any religious sect or denomination. It does not vary the question, in the present case, that Mr. Cain belonged to a sect of religionists, who perform ministerial labor gratuitously." (*Ex parte Cain,* 39 Ala. 440-441)

If the decision of the court below is permitted to stand, disastrous and far-reaching devastating effects may be reached. If a regular and duly ordained minister of religion who, in every sense of the word, qualified as an ordained minister and conforms to the regulations of his organization, can be denied his exemption because some of his time

is devoted to other matters outside of his ministry, then the deferments and exemptions granted by Congress under the Act are in danger of being nullified completely.

Congress provided for the deferment of the vice-president of the United States, members of Congress, judges of courts, members of state legislatures, and governors of the various states, as long as they continued in office. It provided for the exemption of ministers of religion. Certainly Congress did not intend to deny the deferment to a member of Congress because he practiced law on the side. The Congress did not intend to permit the deferment to be withdrawn from a judge of a court because he operated a farm as an avocation. It did not intend to deny the deferment to governors of the states because they may have business and economic interests that they maintained and operated while occupying office. Certainly Congress did not intend to deny the rich clergy their exemption because much of their time is devoted to care of investments, bonds and stocks and other economic enterprises.

Since it was not intended that the deferment and exemption should be denied in any of the above hypothetical situations, it must be assumed that Congress did not intend to deny the exemption to the poor preacher who is forced to work, or who chooses to work, part of the time to sustain himself in his full-time ministry pursuits and occupation. It must be assumed that Congress intended to accord the exemption, as is shown in the Selective Service Regulations (Section 622.44), to every person "who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member", irrespective of whether he devotes time on the side to other pursuits to earn his livelihood.

The court below cites a large number of cases to sustain its conclusion that petitioner was not a minister of religion. [117-118] All the courts that rendered the decisions, denying the exemption to Jehovah's witnesses, including the

court below, have arbitrarily and discriminatorily judged Jehovah's witnesses according to the standards of the orthodox religious denominations that have rigid creeds, ecclesiastical laws and traditional canons. These courts should not have compared the record made in these cases with the background of the personal religious experience of the judges of the courts that made the activity of Jehovah's witnesses appear exotic. If the courts had employed a realistic approach they would have been driven to the conclusion that Jehovah's witnesses constitute a religious denomination and that their ministers are actually preaching, and thus come within the exemption intended by Congress to extend to all religious organizations.

Moreover, these courts, in the decisions rendered where these erroneous conclusions were reached, considered only tangentially the question of whether Jehovah's witnesses were entitled to claim the exemption. Most of those decisions did not require the court to pass upon the merit of the claim made before the draft boards by Jehovah's witnesses. In most of said opinions the courts decided the appeals in the criminal cases adversely to Jehovah's witnesses, holding that they were not entitled to challenge the legality of the classification given them because they had not exhausted their administrative remedies by reporting for induction. Accordingly, the discussion in those opinions, as to whether Jehovah's witnesses are ministers under the Act and Regulations, was wholly unnecessary to the decision made in each of those cases. Such discussions were *dicta*.

Moreover, the decision of the court below is directly in conflict with *United States ex rel. Hull* v. *Stalter*, 151 F. 2d 633, *Murdock* v. *Pennsylvania*, 319 U. S. 105, and *Follett* v. *McCormick*, 321 U. S. 573, in which cases it was held that Jehovah's witnesses are ministers of religion engaged in preaching the gospel of God's kingdom as regular and duly ordained ministers entitled to full protection of the law

that is accorded to the ministers of the "older and better known religious denominations". [117]*

Much could be written so as to state the many reasons answering the multifarious arguments that petitioner and Jehovah's witnesses are not entitled to exemption as ministers of religion. Time and time again thorough explanations have been made to this Court in draft cases on all questions related to this subject. However, in none of such cases have the questions been reached for decision. Time and space will not be utilized here to restate these matters. Some of the questions were succinctly discussed in the petition for writ of certiorari filed in No. 290, October Term 1946, *Swaczyk* v. *United States.* (See pages 21-41.) Exhaustive and elaborate argument on many of the related questions inherent in this case was made to this Court in joint brief for petitioners filed in No. 66, October Term 1945, *Smith* v. *United States* and No. 292, October Term 1945. *Estep* v. *United States.* (See pages 131-190.) Reference is here made to the arguments appearing at the respectively designated pages in said petition and joint brief and incorporated here as though copied at length.

* See also *Semansky* v. *Stark,* 196 La. 307, 199 S. 129; *Shreveport* v. *Teague,* 200 La. 679, 8 S. 2d 640; *Thomas* v. *Atlanta,* 59 Ga. App. 520, 1 S. E. 2d 598; *Jones* v. *Moultrie,* 33 S. E. 2d 561; *Burns* v. *Carrollton,* 34 S. E. 2d 621; *State* v. *Meredith,* 197 S. C. 351, 15 S. E. 2d 678; *Donley* v. *Colorado Springs,* 40 F. Supp. 15; *Commonwealth* v. *Akmakjian,* 316 Mass. 97, 55 N. E. 2d 6; *Commonwealth* v. *Richardson,* 313 Mass. 632, 638.

Conclusion

It is submitted that this case is one calling for the exercise by this court of its supervisory powers under the Judicial Code and the Rules of this court. To that end the petition for writ of certiorari should be granted so as to correct the errors committed; and petitioner further prays that the judgment rendered by the circuit court of appeals and the district court against petitioner be reversed and petitioner discharged or, in the alternative, that the judgments be reversed and a new trial ordered.

Respectfully submitted,

HAYDEN C. COVINGTON
Counsel for Petitioner

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OCT 24 1946

No. 535

In the Supreme Court of the United States

OCTOBER TERM, 1946

THEODORE MARTIN SUNAL, PETITIONER

v.

DAVID R. LARGE, SUPERINTENDENT, FEDERAL PRISON CAMP, MILL POINT, WEST VIRGINIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statute and Regulations Involved	2
Statement	3
Argument	13
Conclusion	22

CITATIONS

Cases:

Chin Yow v. *United States*, 208 U. S. 8	19
Collins v. *Johnston*, 237 U. S. 502	15
Estep v. *United States*, 327 U. S. 114	13, 15, 17, 18
Mahler v. *Eby*, 264 U. S. 32	16
Nishimura Ekiu v. *United States*, 142 U. S. 651	16
Rea v. *McDonald*, 153 F. 2d 190, certiorari denied March 25, 1946	17
Smith v. *United States*, No. 534, this Term	21
Trainin, United States ex rel. v. *Cain*, 144 F. 2d 944, certiorari denied, 323 U. S. 795	20
United States v. *Stalter*, 151 F. (2d) 633	21

Statute and Regulations:

Selective Training and Service Act of 1940, 54 Stat. 885 (50 U. S. C. App. 305), Sec. 5 (d)	2
28 U. S. C. 461	17
Selective Service Regulations, Sec. 622.44	2

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OPINION BELOW

The opinion of the circuit court of appeals (R. 102–118) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered July 29, 1946 (R. 118–119). The petition for a writ of certiorari was filed September 25, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

At his criminal trial for refusing to submit to induction, petitioner's tendered defense of illegal classification was rejected. After conviction, petitioner initiated the present habeas corpus proceeding challenging the jurisdiction of the convicting court and the legality of his selective service classification. The principal questions presented are:

1. Whether the habeas corpus court erred in undertaking to determine the validity of the defense tendered at the criminal trial.

2. Whether there is foundation in fact for the selective service boards' refusals to classify petitioner as a minister of religion.

STATUTE AND REGULATIONS INVOLVED

Section 5 of the Selective Training and Service Act of 1940, 54 Stat. 885 (50 U. S. C. App. 305), provides in part:

> (d) Regular or duly ordained ministers of religion, * * * shall be exempt from training and service (but not from registration) under this Act.

The Selective Service Regulations provide in part:

> 622.44 *Class IV–D: Minister of religion or divinity student.* (a) In Class IV–D shall be placed any registrant:
>
> * * * * * *
>
> (2) Who is a duly ordained minister of religion, or
>
> * * * * * *

(c) A "duly ordained minister of religion" is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties. (9 F. R. 5202.)

STATEMENT

On March 11, 1946, Rudolph J. Sunal filed a petition for a writ of habeas corpus in the District Court for the Southern District of West Virginia on behalf of his brother, Theodore Martin Sunal, hereinafter referred to as petitioner, who was in respondent's custody. Briefly, the petition alleged that on March 22, 1945, petitioner was convicted in the District Court for the Western District of Pennsylvania of refusing to submit to induction, in violation of Section 11 of the Selective Training and Service Act, and was sentenced to imprisonment for five years. The petition alleged that this judgment was void (1) because petitioner was illegally denied classification as a duly ordained minister of religion, and the induction order and subsequent judicial proceedings were therefore void, and (2) because the convicting court denied him the opportunity to prove "any substantial defense" to the indictment by excluding evidence which he proffered, which was calculated to show that he was a min-

ister of religion (R. 1–19). The writ issued (R. 20), respondent filed an answer (R. 23–27), and a hearing was had, at which petitioner's selective service file was introduced. At the hearing, it was stipulated (R. 86–88), *inter alia,* that at the trial of the criminal case petitioner "attempted to offer de novo evidence as to his activity, background and training as a minister and also upon the trial attempted to offer into evidence the entire Draft Board file"; that this evidence was rejected by the convicting court on the theory that the jury could not inquire into the validity of the selective service classification or into the question whether petitioner was a minister of religion, and the court instructed the jury that these issues were not open for their consideration; and that petitioner did not appeal his conviction.

The pertinent facts relating to petitioner's selective service classification, as revealed by the information in his selective service file, may be summarized as follows:

Petitioner registered under the Selective Training and Service Act with Local Board No. 26, Pittsburgh, Pennsylvania, and on January 15, 1941, he filed his selective service questionnaire (R. 28–33). In answer to Series IV (R. 28–29) of the questionnaire[1] concerning his "occupation

[1] In Series III (R. 28), petitioner stated that his education consisted of four years of elementary school and four years of high school.

A letter dated February 2, 1942, from the local board to the Acting Director of Selective Service for Pennsylvania states that petitioner was born November 8, 1916.

or activity," he stated that he worked as an "automotive carburetor and electrical mechanic"; that he had performed this work for six years; that his average weekly earnings were $25; that he was employed by the "Bendix-Westinghouse Automotive Air Brake Co."; that he was not engaged in any other business or work; that he was not licensed in any trade or profession; and that there were no other facts concerning his occupation which were pertinent to determining his selective service classification. In Series V, he stated that during the previous five years he had no occupational experience other than the described job, and in Series VII (R. 29–30), he claimed his parents as dependents. Series VIII (R. 30) relates to "Minister, or Student preparing for the ministry" and provides space for a detailed explanation of any claim to exemption on this ground; petitioner stated, "I am not a minister of religion" and did not fill in any of the remaining spaces in this part of the questionnaire. In Series X (R. 31), petitioner claimed exemption from both combatant and noncombatant military service on the ground that he was a conscientious objector, and he requested classification in Class "IV," which is described in the questionnaire as the classification for those whose induction is deferred by law.

In support of his claim to exemption from military service as a conscientious objector, petitioner filed the special form provided for registrants making such claims. In that document (R. 34–37) he stated, *inter alia*, that "From childhood, through parental guidance have I been taught the necessary steps for true christianity. The bible used as the source of all training"; that under no circumstances did he believe in aggressive force; that he gave public expression to his views in that "as one of Jehovah's witnesses I have partaken in door to door testimony service, presenting the gospel message to those who cared to hear * * *"; and that since 1934, his only occupation, position, job, or type of work, whether compensated or not, was "mechanical." In describing his religious affiliation, petitioner stated that "I have been raised from childhood as one of Jehovah's witnesses"; that the "church, congregation, or meeting" where he customarily attended was "Kingdom Hall, 907 Middle Street, Pittsburgh"; that the pastor or leader of this religious group was Mr. Joseph Petti; that Jehovah's Witnesses have no creed in respect of participation in war, "sole responsibility being upon individual and his devotion to written law of God"; and that he was a member of the AFL Mechanics Union.

On the basis of this information, the local board on May 10, 1941, classified petitioner I–A

(available for military service) (R. 31). On May 15, 1941, petitioner for the first time claimed classification as a minister of religion. He appeared before the board on that date and submitted a letter in which he asserted that he was an "associate minister to the Allegheny Company of Jehovah's Witnesses" and requested classification in IV–D.[2] The letter was accompanied by documents, including an affidavit of Petti, the leader of the Allegheny Company, to the effect that petitioner had been a regular minister of religion since 1935. The board's minutes (R. 32) reflect that it considered the new information submitted by petitioner and on June 24, 1941, "declined deferment as a minister because it does not believe the registrant's status comes within the purpose and intent of the Selective Service Act regarding ministers" (see also R. 38).[3]

Thereafter, on July 8, 1941, petitioner had another hearing before the local board. A summary of that hearing, evidently prepared by the board, recites that—

> He added very little to the previous evidence regarding his being a minister of christianity. He stated he has no regular

[2] The letter is not reproduced in the printed record, but it is contained in the selective service file which, pursuant to stipulation (R. 120), is before this Court in its original form.

[3] In respect of petitioner's claim that he was a conscientious objector, the minutes state, "The question is referred to the Appeal Board or Department of Justice" (R. 32).

> church or institution where he preaches, but goes from house to house in the evening to preach their doctrines. He receives absolutely no salary or remuneration for this, and depends entirely on his secular job to support himself. (R. 39.)

Petitioner appealed from the local board's I–A classification (R. 31), and on July 10, 1941, he wrote another letter (R. 39–40) to the local board, requesting that it be attached to his questionnaire. He stated in this letter that his position as a minister was based upon training by his parents, and "correspondence instruction publications of the Watch Tower Bible and Tract Society of New York"; that "I have always when opportune, served as a field publisher, active ministry from door to door"; that "I also serve as assistant to the Treasurer of the Allegheny unit of Jehovah's witnesses. Also retaining the capacity of Study Conductor for a specified area of the Allegheny company." On December 28, 1941, petitioner addressed a letter (R. 42–44) to the board of appeal explaining that when he filed his questionnaire with the local board in January 1941, he stated in answer to the questions in Series VIII that he was not a minister of religion because he regarded himself, instead, as a "minister of Christianity." The letter further stated that he had been formally ordained, had been a minister of the Allegheny company, and did cus-

tomarily serve as a minister of Christianity.[4] The board of appeal on January 27, 1942, classified petitioner IV–E, as a conscientious objector (R. 31).[5]

Thereafter, in a letter dated January 31, 1942, to the Director of Selective Service for Pennsylvania,[6] petitioner stated that because of his religious beliefs he would not serve in a "'C. O. camp'' and that he should be classified as a minister of religion. The State Director examined petitioner's selective service file and declined to interfere with the classification because the facts did not warrant such action.[7]

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[4] The letter did not explain, however, why petitioner failed to state in his questionnaire that he was a minister of Christianity, either in appropriate spaces provided for a description of his occupation or activities as a basis for classification, or in the space provided at the end of the questionnaire for other facts material to determining his classification.

[5] In doing so the board accepted the recommendation of the Department of Justice hearing officer who had conducted a hearing on petitioner's claim that he was a conscientious objector. At the hearing before the hearing officer, petitioner adduced numerous affidavits from other Jehovah's Witnesses to the effect that he had been affiliated with the sect for a number of years, or that he was a minister, or that his reputation for honesty and integrity was good. The hearing officer's report is included in petitioner's selective service file.

[6] The letter is contained in petitioner's selective service file.

[7] See the State Director's letter of February 26, 1942, contained in the selective service file. National Headquarters of the Selective Service System reached a similar conclusion,

Petitioner was subsequently ordered to report to his local board for work of national importance, and he refused to do so. On May 19, 1942, he was convicted on account of this violation of the Selective Training and Service Act and sentenced to imprisonment for two years and to pay a fine of $100. He was released from prison on December 6, 1943. (See R. 76.)

Upon his discharge from prison, petitioner renewed his claim to classification as a minister of religion, but he submitted no new evidence at that time (see R. 45–46). On May 19, 1944, the local board classified him I–A (R. 32). Petitioner appeared at the office of the board on May 26, 1944, and requested a hearing before the board (R. 48–49). It appears from a summary, evidently prepared by the board's clerk, that petitioner said at that time that he was working four hours each day as an automobile mechanic and devoted the remainder of his time, approximately 150 hours a month, "to the ministry" (R. 48). Petitioner was given a hearing before the board on June 9, 1944 (R. 32, 50), at which time he presented a

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pointing out in a letter of April 20, 1942, to the State Director that "this registrant's name is not on the certified list of Jehovah's Witnesses on file in this Headquarters and there is nothing in the correspondence [from petitioner] which would indicate that the registrant has been improperly classified or which would warrant an investigation to determine the circumstances surrounding the registrant's classification."

letter[8] stating that "I have publicly symbolized my consecration to do God's will by water immersion in 1935"; that upon his release from imprisonment he was designated a "Pioneer" by the Watch Tower Bible and Tract Society, which meant that he was required to devote 150 hours each month to Jehovah's Witnesses' work; that that work consisted of going from house to house and conducting Bible studies, for which he received no remuneration; that he had been trained for the work by his parents and in Watch Tower Bible schools; that he was "an ardent student of the Watch Tower Magazine"; and that "by reason of being an ordained minister I can perform and preach funeral services, marriage ceremonies, immersion (baptismal) discourses." The letter was accompanied by numerous affidavits of other Jehovah's Witnesses, all to the effect that petitioner was a minister. On June 12, 1944, petitioner submitted another letter and supporting documents, in the same vein as those submitted on June 9 (R. 51–65).[9]

The local board's minute of June 23, 1944, states that "after Hearing on June 9, 1944 and after due consideration of facts presented Board sees no change in status of registrant than it was

[8] The letter of June 9, 1944, to the local board is contained in the selective service file.

[9] Petitioner's letter of June 12, 1944, is contained in the selective service file.

when classified by appeal Board on 7/29/41"; petitioner was accordingly classified I–A (R. 32).

On July 1, 1944, petitioner took an appeal and submitted a letter to the board of appeal outlining the respects in which he believed the local board erred (R. 67–69). In this letter he stated that he devoted 150 hours a month to Jehovah's Witnesses' activity, 120 hours to his secular job, and his remaining time to assisting his parents operate their farm. On August 31, 1944, the board of appeal, by a vote of 4–0, classified petitioner in I–A (R. 33).

On October 18, 1944, petitioner submitted further information, mostly cumulative of information already before the local board. The board concluded that it did not warrant reopening the classification (R. 82). Petitioner thereafter urged the state and national directors of Selective Service to intercede on his behalf, but they found no basis for doing so (see R. 78–79). He was ordered to report for induction on October 25, 1944, and he reported, but refused to submit to induction, informing the officials at the induction station that he should have been classified as a minister of religion (see R. 80–81). His conviction in March 1945 followed (see p. 4, *supra*).

The district court below concluded (R. 86) that habeas corpus is an available remedy to inquire into the legality of petitioner's selective service classification; and the court found as a fact (R.

96) that "the record of the petitioner made before his draft boards, filed as part of the evidence in this proceeding, contains evidence upon which the draft boards were justified in placing petitioner in Class I–A, as aforesaid, and denying his claim to the ministerial classification." Accordingly, the writ was discharged (R. 98–99), but petitioner was released from respondent's custody on bail pending appeal (R. 94, 99). Upon appeal to the Circuit Court of Appeals for the Fourth Circuit, the judgment was affirmed (R. 118–119).

ARGUMENT

In *Estep* v. *United States*, 327 U. S. 114, 124, this Court said that if, upon a trial for refusing to submit to induction, a registrant could not defend "* * * on the ground that the local board had no jurisdiction in the premises, it would seem that the way would then be open to him to challenge the jurisdiction of the local board after conviction by *habeas corpus*." In this case, petitioner's tendered defense of illegal classification was rejected by the convicting court; and the court below, relying on the *Estep* opinion, held that petitioner was entitled to a writ of habeas corpus to inquire into the question whether the local board acted beyond its jurisdiction in ordering him to report for induction pursuant to his I–A classification. The evidence which petitioner tendered in the convicting court was reviewed by

the habeas corpus court and by the court below on appeal, and both courts concluded that petitioner failed to sustain his burden of showing that the local board lacked jurisdiction. It was for this reason that the writ was discharged.

Petitioner's contentions in this Court are twofold. He urges (Pet. 13–27) that the habeas corpus court should have limited its inquiry to a determination whether his proffered defense was rejected at the criminal trial and should not have examined the administrative record to determine whether there was a basis in fact for petitioner's classification. His second, and alternative, argument (Pet. 28–33) is that, in any event, the courts below erred in their conclusion that selective service boards were justified in denying his claim to classification as a minister of religion. Granting for purposes of argument that habeas corpus is available to petitioner in the circumstances of this case, we think that petitioner is mistaken in both respects.

1. *The scope of the habeas corpus inquiry.*—We think the circuit court of appeals (R. 111–112) was correct in holding that where habeas corpus is available, the habeas corpus court must determine whether the registrant's local board lacked jurisdiction to order him to submit to induction. The Government's arguments in support of this view, and the supporting judicial decisions, are fully stated in the opinion of the

court below (see R. 108–112; see also R. 103–108), and we shall not undertake to restate them here.

We think it is sufficient to point out, additionally, that petitioner's argument completely overlooks the fact that this Court said in the *Estep* case, 327 U. S. at 124, that where, as here, a proffered defense of illegal classification is rejected at the criminal trial, habeas corpus after conviction for refusal to submit to induction is available "to challenge the jurisdiction of the local board." Quite plainly, the habeas corpus court can decide such a challenge only by examining the administrative record and any other pertinent evidence for the purpose of determining whether there is a basis in fact for the classification or whether the local board departed from the selective service regulations in any substantial respect. Petitioner's view that the habeas corpus court should determine only whether the tendered defense was excluded at the criminal trial, without considering the merits of the defense, finds no support in what this Court said in the *Estep* decision, and it is directly contrary to the action of this Court in an analogous situation in *Collins* v. *Johnston*, 237 U. S. 502, 506–507. In that case a petition for a writ of habeas corpus was predicated on the claim that the petitioner, who had been convicted of perjury, was deprived of due process because the convicting

court refused to consider "a valid and legally conclusive defense," viz., that the false testimony upon which the charge of perjury was based was not material to the trial at which it was given. This Court held that the petition for a writ of habeas corpus was properly denied without a hearing, because it appeared on the face of the petition that the petitioner was not entitled to the writ. But the Court also considered the merits of the claimed defense and concluded that the petitioner had not shown that his perjury related to an immaterial matter. In this case, we think the courts below properly did the same thing by considering whether the evidence upon which petitioner relies shows that his local board lacked jurisdiction in the premises. Cf. *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 662; *Mahler* v. *Eby*, 264 U. S. 32, 42–43.

The position of the courts below is supported as well by strong practical considerations. It is of little practical value for a habeas corpus court to invalidate a judgment of conviction and require that the prisoner be retried if, upon the retrial, he will be unable to show that he was illegally classified. The course dictated by the decision below, on the other hand, terminates the litigation. If the habeas corpus court finds that the registrant's local board exceeded its jurisdiction, the conviction is voided, he is released from imprisonment under it, and there is no occasion

for a retrial; he is not released merely for a new trial at which, if convicted, he will receive a new sentence, possibly receiving no credit for the time served under the first sentence. If, on the other hand, the court finds against the registrant, he remains in custody to complete service of his sentence. In our view the procedure followed by the courts below in inquiring into the jurisdiction of petitioner's local board protects the interests of both petitioner and the Government, and truly permits the habeas corpus court to dispose of the case as, in the words of the habeas corpus statute (28 U. S. C. 461), "law and justice require." [10]

[10] Petitioner suggests (Pet. 10), as a reason for granting certiorari, that the decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Rea* v. *McDonald*, 153 F. 2d 190, certiorari denied, March 25, 1946, holding that in circumstances similar to those in the present case, habeas corpus would not lie, notwithstanding that the convicting court refused to allow a proffered defense that the selective service classification was illegal. It is true that the decisions are directly in conflict, but we have serious doubts whether the conflict requires resolution by this Court, for the *Rea* case was decided prior to the *Estep* decision. The decision below followed the *Estep* decision and is predicated on what this Court said in that case. Unless the court below has misconstrued the dictum of this Court concerning the availability of habeas corpus after conviction in cases of refusal to submit to induction, we think that there is no necessity for resolving the conflict of decisions. This is particularly so in this case, for petitioner has been accorded habeas corpus review; he plainly does not urge that the court below should have followed the *Rea* decision.

2. *The validity of petitioner's classification.*— Petitioner does not contend that he was denied any procedural rights in the classification process. His sole claim is that on the evidence before the classifying boards he should have been classified IV-D. To sustain this contention, petitioner bore the burden of establishing that there is no foundation in fact for the refusal of the selective service boards to classify him as a minister of religion. *Estep* v. *United States*, 327 U. S. 114, 122–123. Both courts below held—correctly, we think—that he failed to sustain this burden.

The information which was before the board of appeal when it finally classified petitioner is summarized at pp. 4–12, *supra*. Briefly it shows that in August 1944, petitioner was a trained mechanic who had worked at that trade since 1934 and was at the time devoting about 120 hours a month to such work, in addition to assisting in the operation of his parents' farm. His education consisted of four years of elementary school and four years of high school. Since 1935, he had been actively affiliated with the Allegheny company of Jehovah's Witnesses. His religious training consisted of instruction from his parents and of reading documents issued by the Watchtower Society. Petitioner's religious leader in the Allegheny unit of Jehovah's Witnesses was one Joseph Petti, who apparently was in charge of the unit. As a member of Jehovah's Witnesses, petitioner's re-

ligious activities consisted principally of going from house to house preaching and distributing literature of the sect. He had no church and he received no remuneration for his services. In 1944, he claimed he was devoting approximately 150 hours each month to these activities.

Accepting petitioner's evidence as true, which the classifying board was not required to do "even though no contrary or impeaching testimony was adduced" (*Chin Yow* v. *United States*, 208 U. S. 8, 11–12), we think it fails completely to show that he stands in the same relationship to the Allegheny unit of Jehovah's Witnesses, with which he is affiliated, as do ministers of other religious faiths to their congregations. Indeed, it affirmatively appears from petitioner's evidence that he regarded one Joseph Petti as his pastor or religious leader. While the evidence shows that petitioner believes in the doctrines and practices of Jehovah's Witnesses and is a willing worker in behalf of the sect, it does not show that he devotes his life to the furtherance of their beliefs. His most active participation in religious work has not at any time averaged more than approximately five hours a day. Prior to his first conviction, it necessarily was considerably less, for he then held a full-time job as a mechanic.

Similarly, there is no evidence that petitioner performs the functions which are customarily performed by regular or duly ordained ministers

of other religions. Nor is there any evidence that he is the religious leader of the Allegheny unit of Jehovah's Witnesses, that he leads them in worship, that he, in fact, marries the young or buries the dead, or that he performs any of the functions which are customarily associated with ministers of religion. At best, his evidence shows that he, like other members of the Jehovah's Witnesses sect, practices his religious beliefs by "witnessing" from house to house. It does not show any distinction in function or status between petitioner and the other members of the Allegheny unit. He is not their religious leader and he evidently possesses no authority over their activities. Like other Jehovah's Witnesses, he devoutly practices his religion, but that is all.

Unless it can be said that all Jehovah's Witnesses are ministers of religion within the meaning of the Selective Training and Service Act and the regulations, petitioner's board of appeal had ample basis for denying him classification as a minister. It seems plain that Congress did not intend, in Section 5 (d), to exempt an entire religious sect from service under the Act. As the Circuit Court of Appeals for the Second Circuit said in *United States ex rel. Trainin* v. *Cain*, 144 F. 2d 944, 949, certiorari denied, 323 U. S. 795:

> * * * Unlike the exemption for conscientious objectors of § 5 (g) of the Act, which was granted to meet the personal convictions of certain of the registrants, see

> United States ex rel. Phillips v. Downer, supra, and which is only from combatant service, the absolute exemption of "regular or duly ordained ministers of religion" contained in § 5 (d) seems more a recognition of the public need for spiritual guidance than a mere individual privilege. Thus, ministers of religion are relieved of the duty of service not so much for their personal religious training and beliefs, but for the disruption of public worship and religious solace to the people at large which would be caused by their induction. * * *

If, as the Director of Selective Service has determined (see p. 19 of our brief in opposition in *Smith* v. *United States*, No. 534, this Term), and, as we think, only those members of the Jehovah's Witnesses sect who are comparable in status and function to ministers of other religious faiths are entitled to exemption from military service, there can be no question, as the courts below found, that petitioner was properly denied classification as a minister of religion.[11]

[11] Petitioner urges (Pet. 11, 32) that this case is substantially the same on its facts as *United States* v. *Stalter*, 151 F. 2d 633 (C. C. A. 7), where the court concluded that the registrant was improperly denied classification in IV-D. We think that decision is open to serious question, since it nowhere appeared from the facts that the registrant stood in the same relationship to other Jehovah's Witnesses as does a minister in other religious sects to his congregation. Significantly, the court disagreed with the petitioner's view that all Jehovah's Witnesses are ministers and are thus exempt from military service (151 F. 2d at 637). The Circuit Court

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
IRVING S. SHAPIRO,
Attorneys.

OCTOBER 1946.

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of Appeals for the Seventh Circuit found that the registrant devoted his "full time to ministerial work" and that he therefore should have been classified as a minister. The most favorable evidence for petitioner in this case shows that at the time of his final classification he was a mechanic who, as a member of Jehovah's Witnesses, practiced his religion by witnessing from house to house for a few hours a day, as do other members of the sect.

U. S. GOVERNMENT PRINTING OFFICE: 1946

No. 535

In the Supreme Court of the United States

OCTOBER TERM, 1946

THEODORE MARTIN SUNAL, PETITIONER

v.

DAVID R. LARGE, SUPERINTENDENT, FEDERAL PRISON CAMP, MILL POINT, WEST VIRGINIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute and regulations involved	2
Statement	2
Summary of Argument	13
Argument:	
If, as the court below held, the habeas corpus court had jurisdiction to inquire into the proceedings before the selective service boards, that court correctly determined that there was found basis in fact for the refusal of the board of appeal to classify petitioner as a minister of religion	15
Conclusion	20

CITATIONS

Cases:	
Alexander v. *United States ex rel. Kulick*, No. 840	2, 13, 15, 16
Chin Yow v. *United States*, 208 U. S. 8	17
Estep v. *United States*, 327 U. S. 114	12, 16
United States v. *Stalter*, 151 F. 2d 633	20
United States ex rel. Trainin v. *Cain*, 144 F. 2d 944, certiorari denied, 323 U. S. 795	19
Statutes:	
Selective Training and Service Act:	
Section 5(d)	19
Section 11	3
Miscellaneous:	
State Director Advice No. 213-B	13

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OPINION BELOW

The district court wrote no opinion; its findings of fact and conclusions of law appear at R. 95–97. The opinion of the circuit court of appeals (R. 102–118) is reported at 157 F. 2d 165.

JURISDICTION

The judgment of the circuit court of appeals was entered July 29, 1946 (R. 118–119). The petition for a writ of certiorari was filed September 25, 1946, and was granted January 20, 1947 (R. 121). The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, after conviction for refusing to submit to induction, petitioner is entitled to resort to habeas corpus to challenge the judgment of conviction on the ground that the convicting court improperly rejected his proffered defense that his selective service classification was invalid.

2. If habeas corpus is an available remedy, whether the inquiry by the habeas corpus court should be limited to the question whether the defense was tendered and rejected by the convicting court or whether the habeas corpus court should also inquire into the jurisdiction of the classifying board.

3. If the latter, whether the habeas corpus court erred in finding that the final classifying board did not exceed its jurisdiction in refusing to classify respondent as a minister of religion.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutory provisions and regulations are set forth in the Appendix, pp. 57–65 of the brief for petitioner in *Alexander* v. *United States ex rel. Kulick*, No. 840, which precedes this case on argument.

STATEMENT

On March 11, 1946, Rudolph J. Sunal filed a petition for a writ of habeas corpus in the Dis-

trict Court for the Southern District of West Virginia on behalf of his brother, Theodore Martin Sunal, hereinafter referred to as petitioner, who was in respondent's custody. Briefly, the petition alleged that on March 22, 1945, petitioner was convicted in the District Court for the Western District of Pennsylvania of refusing to submit to induction, in violation of Section 11 of the Selective Training and Service Act, and was sentenced to imprisonment for five years. The petition alleged that this judgment was void (1) because petitioner was illegally denied classification as a duly ordained minister of religion, and the induction order and subsequent judicial proceedings were therefore void, and (2) because the convicting court denied him the opportunity to prove "any substantial defense" to the indictment by excluding evidence which he proffered, which was calculated to show that he was a minister of religion (R. 1–19).

The writ issued (R. 20), respondent filed an answer (R. 23–27), and a hearing was had, at which petitioner's selective service file was introduced. At the hearing, it was stipulated (R. 86–88), *inter alia*, that at the trial of the criminal case petitioner "attempted to offer de novo evidence as to his activity, background and training as a minister and also upon the trial attempted to offer into evidence the entire Draft Board file"; that this evidence was rejected by the convicting court on the theory that the jury could not inquire into the validity of the

selective service classification or into the question whether petitioner was a minister of religion, and the court instructed the jury that these issues were not open for their consideration; and that petitioner did not appeal his conviction.

The pertinent facts relating to petitioner's selective service classification, as revealed by the information in his selective service file, may be summarized as follows:

Petitioner registered under the Selective Training and Service Act with Local Board No. 26, Pittsburgh, Pennsylvania, and on January 15, 1941, he filed his selective service questionnaire (R. 28–33). In answering Series IV (R. 28–29) of the questionnaire[1] concerning his "occupation or activity" he stated that he worked as an "automotive carburetor and electrical mechanic"; that he had performed this work for six years; that his average weekly earnings were $25; that he was employed by the "Bendix-Westinghouse Automotive Air Brake Co."; that he was not engaged in any other business or work; that he was not licensed in any trade or profession; and that there were no other facts concerning his occupation which were pertinent to determining his selective service classification. In Series V, he

[1] In Series III (R. 28), petitioner stated that his education consisted of four years of elementary school and four years of high school.

A letter dated February 2, 1942, from the local board to the Acting Director of Selective Service for Pennsylvania states that petitioner was born November 8, 1916.

stated that during the previous five years he had no occupational experience other than the described job, and in Series VII (R. 29–30), he claimed his parents as dependents. Series VIII (R. 30) relates to "Minister, or Student preparing for the ministry" and provides space for a detailed explanation of any claim to exemption on this ground; petitioner stated, "I am not a minister of religion" and did not fill in any of the remaining spaces in this part of the questionnaire. In Series X (R. 31), petitioner claimed exemption from both combatant and noncombatant military service on the ground that he was a conscientious objector, and he requested classification in Class "IV," which is described in the questionnaire as the classification for those whose induction is deferred by law.

In support of his claim to exemption from military service as a conscientious objector, petitioner filed the special form provided for registrants making such claims. In that document (R. 34–37) he stated, *inter alia,* that "From childhood, through parental guidance have I been taught the necessary steps for true christianity. The Bible used as the source of all training"; that under no circumstances did he believe in aggressive force; that he gave public expression to his views in that "as one of Jehovah's Witnesses I have partaken in door to door testimony service, presenting the gospel message to those who cared to hear * * *"; and that since 1934, his only occupa-

tion, position, job, or type of work, whether compensated or not, was "mechanical". In describing his religious affiliation, petitioner stated that "I have been raised from childhood as one of Jehovah's Witnesses"; that the "church, congregation, or meeting" where he customarily attended was "Kingdom Hall, 907 Middle Street, Pittsburgh"; that the pastor or leader of this religious group was Mr. Joseph Petti; that Jehovah's Witnesses have no creed in respect of participation in war, "sole responsibility being upon individual and his devotion to written law of God"; and that he was a member of the AFL Mechanics Union.

On the basis of this information, the local board on May 10, 1941, classified petitioner I–A (available for military service) (R. 31). On May 15, 1941, petitioner for the first time claimed classification as a minister of religion. He appeared before the board on that date and submitted a letter in which he asserted that he was an "associate minister of of the Allegheny Company of Jehovah's Witnesses" and requested classification in IV–D.[2] The letter was accompanied by documents, including an affidavit of Petti, the leader of the Allegheny Company, to the effect that petitioner had been a regular minister of religion since 1935. The board's minutes (R. 32) reflect

[2] The letter is not reproduced in the printed record, but it is contained in the selective service file which, pursuant to stipulation (R. 120), is before this Court in its original form.

that it considered the new information submitted by petitioner and on June 24, 1941, "declined deferment as a minister because it does not believe the registrant's status comes within the purpose and intent of the Selective Service Act regarding ministers" (see also R. 38).[2]

Thereafter, on July 8, 1941, petitioner had another hearing before the local board. A summary of that hearing, evidently prepared by the board, recites that—

> He added very little to the previous evidence regarding his being a minister of christianity. He stated he has no regular church or institution where he preaches, but goes from house to house in the evening to preach their doctrines. He receives absolutely no salary or remuneration for this, and depends entirely on his secular job to support himself. (R. 39.)

Petitioner appealed from the local board's I-A classification (R. 31), and on July 10, 1941, he wrote another letter (R. 39–40) to the local board, requesting that it be attached to his questionnaire. He stated in this letter that his position as a minister was based upon training by his parents and "correspondence instruction publications of the Watch Tower Bible and Tract Society of New York"; that "I have always when opportune

[2] In respect of petitioner's claim that he was a conscientious objector, the minutes state, "The question is referred to the Appeal Board or Department of Justice" (R. 32).

served as a field publisher, active ministry from door to door"; that "I also serve as assistant to the Treasurer of the Allegheny unit of Jehovah's Witnesses. Also retaining the capacity of Study Conductor for a specified area of the Allegheny company." On December 28, 1941, petitioner addressed a letter (R. 42–44) to the board of appeal explaining that when he filed his questionnaire with the local board in January 1941, he stated in answer to the questions in Series VIII that he was not a minister of religion because he regarded himself, instead, as a "minister of Christianity." The letter further stated that he had been formally ordained, had been a minister of the Allegheny company, and did customarily serve as a minister of Christianity.[4] The board of appeal on January 27, 1942, classified petitioner IV–E, as a conscientious objector (R. 31).[5]

[4] The letter did not explain, however, why petitioner failed to state in his questionnaire that he was a minister of Christianity, either in appropriate spaces provided for a description of his occupation or activities as a basis for classification, or in the space provided at the end of the questionnaire for other facts material to determining his classification.

[5] In doing so the board accepted the recommendation of the Department of Justice hearing officer who had conducted a hearing on petitioner's claim that he was a conscientious objector. At the hearing before the hearing officer, petitioner adduced numerous affidavits from other Jehovah's Witnesses to the effect that he had been affiliated with the sect for a number of years, or that he was a minister, or that his reputation for honesty and integrity was good. The hearing officer's report is included in petitioner's selective service file.

Thereafter, in a letter dated January 31, 1942, to the Director of Selective Service for Pennsylvania,[6] petitioner stated that because of his religious beliefs he would not serve in a "C. O. camp" and that he should be classified as a minister of religion. The State Director examined petitioner's selective service file and declined to interfere with the classification because the facts did not warrant such action.[7]

Petitioner was subsequently ordered to report to his local board for work of national importance, and he refused to do so. On May 19, 1942, he was convicted on account of this violation of the Selective Training and Service Act and sentenced to imprisonment for two years and to pay a fine of $100. He was released from prison on December 6, 1943. (See R. 76.)

Upon his discharge from prison, petitioner renewed his claim to classification as a minister of religion, but he submitted no new evidence at that time. (See R. 45–46.) On May 19, 1944, the local board classified him I–A (R. 32). Peti-

[6] The letter is contained in petitioner's selective service file.

[7] See the State Director's letter of February 26, 1942, containd in the selective service file. National Headquarters of the Selective Service System reached a similar conclusion, pointing out in a letter of April 20, 1942, to the State Director that "this registrant's name is not on the certified list of Jehovah's Witnesses on file in this Headquarters and there is nothing in the correspondence [from petitioner] which would indicate that the registrant has been improperly classified or which would warrant an investigation to determine the circumstances surrounding the registrant's classification."

tioner appeared at the office of the board on May 26, 1944, and requested a hearing before the board (R. 48–49). It appears from a summary, evidently prepared by the board's clerk, that petitioner said at that time that he was working four hours each day as an automobile mechanic and devoted the remainder of his time, approximately 150 hours a month, "to the ministry" (R. 48).

Petitioner was given a hearing before the board on June 9, 1944 (R. 32, 50), at which time he presented a letter[5] stating that "I have publicly symbolized my consecration to do God's will by water immersion in 1935"; that upon his release from imprisonment he was designated a "Pioneer" by the Watch Tower Bible and Tract Society, which meant that he was required to devote 150 hours each month to Jehovah's Witnesses' work; that that work consisted of going from house to house and conducting Bible studies, for which he received no remuneration; that he had been trained for the work by his parents and in Watch Tower Bible schools; that he was "an ardent student of the Watch Tower Magazine"; and that "by reason of being an ordained minister I can perform and preach funeral services, marriage ceremonies, immersion (baptismal) discourses." The letter was accompanied by numerous affidavits of other Jehovah's Witnesses, all to the effect that peti-

[5] The letter of June 9, 1944, to the local board is contained in the selective service file.

tioner was a minister. On June 12, 1944, petitioner submitted another letter and supporting documents, in the same vein as those submitted on June 9 (R. 51–65).*

The local board's minute of June 23, 1944, states that "after Hearing on June 9, 1944 and after due consideration of facts presented Board sees no change in status of registrant than it was when classified by appeal Board on 7/29/41"; petitioner was accordingly classified I–A (R. 32).

On July 1, 1944, petitioner took an appeal and submitted a letter to the board of appeal outlining the respects in which he believed the board erred (R. 67–69). In this letter he stated that he devoted 150 hours a month to Jehovah's Witnesses' activity, 120 hours to his secular job, and his remaining time to assisting his parents operate their farm. On August 31, 1944, the board of appeal, by a vote of 4–0, classified petitioner in I–A (R. 33).

On October 18, 1944, petitioner submitted further information, mostly cumulative, of information already before the local board. The board concluded that it did not warrant reopening the classification (R. 82). Petitioner thereafter urged the state and national directors of Selective Service to intercede on his behalf, but they found

* Petitioner's letter of June 12, 1944, is contained in the selective service file.

no basis for doing so. (See R. 78–79.) He was ordered to report for induction on October 25, 1944, and he reported, but refused to submit to induction, informing the officials at the induction station that he should have been classified as a minister of religion. (See R. 80–81.) His conviction in March 1945 followed. (See p. 3, *supra*.)

The district court below concluded (R. 86) that habeas corpus is an available remedy to inquire into the legality of petitioner's selective service classification; and the court found as a fact (R. 96) that "the record of the petitioner made before his draft boards, filed as part of the evidence in this proceeding, contains evidence upon which the draft boards were justified in placing petitioner in Class I–A, as aforesaid, and denying his claim to the ministerial classification." Accordingly, the writ was discharged (R. 98–99), but petitioner was released from respondent's custody on bail pending appeal (R. 94, 99).

Upon appeal to the Circuit Court of Appeals for the Fourth Circuit, the judgment was affirmed (R. 118–119). The court held that the exclusion of the profferred defense in the convicting court was an error of law which did not effect the jurisdiction of the court. However, in reliance upon the dictum of this Court in *Estep* v. *United States*, 327 U. S. 114, 123–125, the court held that habeas corpus was an available remedy to probe

the jurisdiction of the selective service boards. Accordingly, the court inquired into the proceedings before the boards and concluded that "the evidence submitted to the District Judge in the habeas corpus proceeding supports his conclusion that there was basis in fact for the denial by the Local and Appeals Boards of Sunal's claim for exemption as a minister of religion" (R. 102–118).

SUMMARY OF ARGUMENT

This case is a companion case to *Alexander* v. *United States ex rel. Kulick,* No. 840, which precedes it on oral argument. The major contentions of the Government are advanced in our brief in the *Kulick* case (pp. 17–45), to which the Court is respectfully referred. The only question in this case requiring independent examination is petitioner's contention, assuming that the issue is open to inquiry by the habeas corpus court, that there is no foundation in fact for the refusal of his board of appeal to classify him as a minister of religion.

The administrative interpretation of the ministerial exemption as applied to the Jehovah's Witnesses sect permits the board to classify a registrant in IV–D if it determines that he stands in the same relationship to members of his sect as a minister stands to his congregation in other religious groups. See State Director Advice No. 213–B, set out at pp. 60–65 in our brief in the *Kulick*

case. This is is to be determined in each individual case based upon—

1. Whether the registrant devotes his life in furtherance of the beliefs of Jehovah's Witnesses; and

2. Whether he performs functions which are performed by regular or duly ordained ministers of other religions; and

3. Whether he is regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.

Tested by this standard, we think it plain that there is foundation in fact for the refusal of the board of appeal to classify him as a minister of religion. Prior to the war petitioner was employed in a full-time job as a mechanic and even held membership in his craft's union. He was a members of the Jehovah's Witnesses sect, and he participated in their religious activities in his spare time by witnessing from door to door. He informed the board that he was not a minister, and that one Petti was his minister of religion. During the war he undertook to devote five hours daily to Jehovah's Witnesses activities; the remainder of his time was devoted to his secular job as a mechanic and to working on a farm.

These facts do not establish, as is required, that petitioner has devoted his life to the furtherance of the beliefs of the sect. They plainly do not

show that he performs the functions customarily associated with regular or duly ordained ministers of other sects. And they fail to show even that he is regarded by other members of the sect as their religious leader. Indeed, petitioner looks to another member of the sect as his minister of religion. The most that can be said is that petitioner's evidence shows that he is a devout Jehovah's Witness who has no specialized training for the ministry and who witnesses from door to door when he is not engaged in his secular work as a mechanic and farmer. On the basis of such facts it cannot be said, we submit, that the board of appeal closed its eyes to the evidence when it refused to classify petitioner as a minister of religion.

ARGUMENT

IF, AS THE COURT BELOW HELD, THE HABEAS CORPUS COURT HAD JURISDICTION TO INQUIRE INTO THE PROCEEDINGS BEFORE THE SELECTIVE SERVICE BOARDS, THAT COURT CORRECTLY DETERMINED THAT THERE WAS FOUNDATION IN FACT FOR THE REFUSAL OF THE BOARD OF APPEAL TO CLASSIFY PETITIONER AS A MINISTER OF RELIGION

This case presents for consideration the same questions that are involved in *Alexander* v. *United States ex rel. Killick*, No. 840, which precedes the present case on oral argument. In our view, the ruling of the trial court rejecting petitioner's proffered defense of illegal classification was, at worst, an error of law which was correctible on

appeal. It was not an error which affected the jurisdiction of the convicting court or any of petitioner's constitutional rights, consequently the habeas corpus court had no jurisdiction to release petitioner from respondent's custody. The considerations in support of this view are marshalled in our brief in the *Kulick* case, pp. 17–41, and there is thus no occasion to repeat them here.

If, despite the arguments we advance, the dictum of the *Estep* decision, 327 U. S. 114, 123–125, "that *habeas corpus* after conviction is available in these cases" to inquire into the jurisdiction of the local board, is reaffirmed and adopted by this Court, the question which remains is whether the selective service boards exceeded their jurisdiction in refusing to classify petitioner as a minister of religion.

Petitioner does not contend that he was denied any procedural rights in the classification process. His sole claim is that on the evidence before the classifying boards he should have been classified IV-D. To sustain this contention, petitioner bore the burden of establishing that there is no foundation in fact for the refusal of the selective service boards to classify him as a minister of religion. *Estep* v. *United States,* 327 U. S. 114, 122–123. Both courts below held—correctly, we think—that he failed to sustain this burden.

The information which was before the board of appeal when it finally classified petitioner is sum-

marized at pp. 4–12 *supra*. Briefly, it shows that in August 1944, petitioner was a trained mechanic who had worked at that trade since 1934 and was at the time devoting about 120 hours a month to such work, in addition to assisting in the operation of his parents' farm. His education consisted of four years of elementary school and four years of high school. Since 1935, he had been actively affiliated with the Allegheny company of Jehovah's Witnesses. His religious training consisted of instruction from his parents and of reading documents issued by the Watchtower Society. Petitioner's religious leader in the Allegheny unit of Jehovah's Witnesses was one Joseph Petti, who apparently was in charge of the unit. As a member of Jehovah's Witnesses, petitioner's religious activities consisted principally of going from house to house preaching and distributing literature of the sect. He had no church and he received no remuneration for his services. In 1944, he claimed he was devoting approximately 150 hours each month to these activities.

Accepting petitioner's evidence as true, which the classifying board was not required to do "even though no contrary or impeaching testimony was adduced" (*Chin Yow* v. *United States*, 208 U. S. 8, 11–12), we think it fails completely to show that he stands in the same relationship to the Allegheny unit of Jehovah's Witnesses, with which

he is affiliated, as do ministers of other religious faiths to their congregations. Indeed, it affirmatively appears from petitioner's evidence that he regarded one Joseph Petti as his pastor or religious leader. While the evidence shows that petitioner believes in the doctrines and practices of Jehovah's Witnesses and is a willing worker in behalf of the sect, it does not show that he devotes his life to the furtherance of their beliefs. His most active participation in religious work has not at any time averaged more than approximately five hours a day. Prior to his first conviction, it was necessarily considerably less, for he then held a full-time job as a mechanic.

Similarly, there is no evidence that petitioner performs the functions which are customarily performed by regular or duly ordained ministers of other religions. Nor is there any evidence that he is the religious leader of the Allegheny unit of Jehovah's Witnesses, that he leads them in worship, that he, in fact, marries the young or buries the dead, or that he performs any of the functions which are customarily associated with ministers of religion. At best, his evidence shows that he, like other members of the Jehovah's Witnesses sect, practices his religious beliefs by "witnessing" from house to house. It does not show any distinction in function or status between petitioner and the other members of the Allegheny unit. He is not their religious leader and he evidently

possesses no authority over their activities. Like other Jehovah's Witnesses, he devoutly practices his religion, but that is all.

Unless it can be said that all Jehovah's Witnesses are ministers of religion within the meaning of the Selective Training and Service Act and the regulations, petitioner's board of appeal had ample basis for denying him classification as a minister. It seems plain that Congress did not intend, in Section 5 (d), to exempt an entire religious sect from service under the Act. As the Circuit Court of Appeals for the Second Circuit said in *United States ex rel. Trainin* v. *Cain,* 144 F. (2d) 944, 949, certiorari denied, 323 U. S. 795:

> * * * Unlike the exemption for conscientious objectors of § 5 (g) of the Act, which was granted to meet the personal convictions of certain of the registrants, see *United States ex rel. Phillips* v. *Downer,* [135 F. (2d) 521], and which is only from combatant service, the absolute exemption of "regular or duly ordained ministers of religion" contained in § 5 (d) seems more a recognition of the public need for spiritual guidance than a mere individual privilege. Thus, ministers of religion are relieved of the duty of service not so much for their personal religious training and beliefs, but for the disruption of public worship and religious solace to the

people at large which would be caused by their induction. * * * .

If, as the Director of Selective Service has determined (see pp. 41–50 of our brief in the *Kulick* case, No. 840, this Term), and, as we think, only those members of the Jehovah's Witnesses sect who are comparable in status and function to ministers of other religious faiths are entitled to exemption from military service, there can be no question, as the courts below found, that petitioner was properly denied classification as a minister of religion.[10]

CONCLUSION

Petitioner should be remanded to respondent's custody. He has failed to sustain his burden of

[10] Petitioner urges that this case is substantially the same on its facts as *United States* v. *Statler*, 151 F. 2d 633 (C. C. A. 7), where the court concluded that the registrant was improperly denied classification in IV-D. We think that decision open to serious question, since it nowhere appeared from the facts that the registrant stood in the same relationship to other Jehovah's Witnesses as does a minister in other religious sects to his congregation. Significantly, the court disagreed with the petitioner's view that all Jehovah's Witnesses are ministers and are thus exempt from military service (151 F. 2d at 637). The Circuit Court of Appeals for the Seventh Circuit found that the registrant devoted his "full time to ministerial work" and that he therefore should have been classified as a minister. The most favorable evidence for petitioner in this case shows that at the time of his final classification he was a mechanic who, as a member of Jehovah's Witnesses, practiced his religion by witnessing from house to house for a few hours a day, as do other members of the sect.

establishing either that his board of appeal exceeded its jurisdiction or that the convicting court lacked jurisdiction.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
IRVING S. SHAPIRO,
Attorneys.

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SUPREME COURT OF THE UNITED STATES

NOS. 535 AND 840.—OCTOBER TERM, 1946.

Theodore Martin Sunal, Petitioner, 535 *v.* David R. Large, Superintendent, Federal Prison Camp, Mill Point, W. Va.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
Myrl Alexander, Warden, Petitioner, 840 *v.* United States, ex rel. John Myron Kulick.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 23, 1947.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Sunal and Kulick registered under the Selective Training and Service Act of 1940, 54 Stat. 885, 57 Stat. 597, 50 U. S. C. App. § 301, *et seq.* Each is a Jehovah's Witness and each claimed the exemption granted by Congress to regular or duly ordained ministers of religion.[1] § 5 (d). The local boards, after proceedings unnecessary to relate here, denied the claimed exemptions and classified these registrants as I–A. They exhausted their administrative remedies but were unable to effect a change in their classifications. Thereafter they were ordered to report for induction—Sunal on October 25, 1944, Kulick on November 9, 1944. Each reported but refused to submit to induction. Each was thereupon indicted, tried and convicted

[1] Sunal in 1942 was classified as a conscientious objector and ordered to report for work of national importance. On his failure to do so he was convicted under the Act and a fine and term of imprisonment were imposed. The events with which we are now concerned relate to his classification after his discharge from prison.

under § 11 of the Act for refusing to submit to induction. Sunal was sentenced on March 22, 1945, Kulick on May 7, 1945, each to imprisonment for a term of years. Neither appealed.

At the trial each offered evidence to show that his selective service classification was invalid. The trial courts held, however, that such evidence was inadmissible, that the classification was final and not open to attack in the criminal trial. On February 4, 1946, we decided *Estep* v. *United States* and *Smith* v. *United States*, 327 U. S. 114. These cases [2] held on comparable facts that a registrant, who had exhausted his administrative remedies and thus obviated the rule of *Falbo* v. *United States*, 320 U. S. 549, was entitled, when tried under § 11, to defend on the ground that his local board exceeded its jurisdiction in making the classification—for example, that it had no basis in fact. 327 U. S. pp. 122–123.

It is plain, therefore, that the trial courts erred in denying Sunal and Kulick the defense which they tendered. Shortly after the *Estep* and *Smith* cases were decided, petitions for writs of *habeas corpus* were filed on behalf of Sunal and Kulick. In each case it was held that *habeas corpus* was an available remedy. In Sunal's case the Circuit Court of Appeals for the Fourth Circuit held that there was a basis in fact for the classification and affirmed a judgment discharging the writ. 157 F. 2d 165. In Kulick's case the Circuit Court of Appeals for the Second Circuit reversed a District Court holding that there was evidence to support the classification, 66 F. Supp. 183, and ruled, without examining the evidence, that

[2] The *Smith* case was decided by the Circuit Court of Appeals on April 4, 1945, 148 F. 2d 288; the petition for certiorari was filed April 25, 1945, and granted May 28, 1945. 325 U. S. 846. The *Estep* case was decided by the Circuit Court of Appeals on July 6, 1945, 150 F. 2d 768; the petition for certiorari was filed August 3, 1945, and granted October 8, 1945. 326 U. S. 703.

since Kulick had been deprived of the defense he should be discharged from custody without prejudice to further prosecution. 157 F. 2d 811. The cases are here on petitions for writs of certiorari, which we granted because of the importance of the questions presented.

The normal and customary method of correcting errors of the trial is by appeal. Appeals could have been taken in these cases, but they were not. It cannot be said that absence of counsel made the appeals unavailable as a practical matter. See *Johnson* v. *Zerbst*, 304 U. S. 458, 467. Defendants had counsel. Nor was there any other barrier to the perfection of their appeals. Cf. *Cochran* v. *Kansas*, 316 U. S. 255. Moreover, this is not a situation where the facts relied on were dehors the record and therefore not open to consideration and review on appeal. See *Waley* v. *Johnston*, 316 U. S. 101, 104; *United States ex rel. McCann* v. *Adams*, 320 U. S. 220, 221. And see *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 274–275. The error was of record in each case. It is said, however, that the failure to appeal was excusable, since under the decisions as they then stood—March 22, 1945, and May 7, 1945—the lower courts had consistently ruled that the selective service classification could not be attacked in a prosecution under § 11. See *Estep* v. *United States*, *supra*, p. 123, n. 15. It is also pointed out that on April 30, 1945, we had denied certiorari in a case which sought to raise the same point,[4] and that *Estep* v. *United States*, *supra*, and *Smith* v.

[3] We therefore lay to one side cases such as *Bridges* v. *Wixon*, 326 U. S. 135, *Duncan* v. *Kahanamoku*, 327 U. S. 304, and *Eagles* v. *United States ex rel. Samuels*, 329 U. S. 304, where the order of the agency under which petitioner was detained was not subject to judicial review.

[4] *Rinko* v. *United States*, 325 U. S. 851. We also denied certiorari in *Flakowicz* v. *United States*, 325 U. S. 851; but it, like *Falbo* v. *United States*, *supra*, was one where the administrative remedies had not been exhausted, there being an additional examination which the registrant had not taken. See *Gibson* v. *United States*, 329 U. S. 338.

United States, supra, were brought here [5] and decided after Sunal's and Kulick's time for appeal had passed. The argument is that since the state of the law made the appeals seem futile, it would be unfair to those registrants to conclude them by their failure to appeal.

We put to one side comparable problems respecting the use of *habeas corpus* in the federal courts to challenge convictions obtained in the state courts. See *New York* v. *Eno*, 155 U. S. 89; *Tinsley* v. *Anderson*, 171 U. S. 101, 104–105; *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13; *Ex parte Hawk*, 321 U. S. 114, 116–117. So far as convictions obtained in federal courts are concerned, the general rule [illegible] *habeas corpus* will not be allowed to do service for an appeal. *Adams* v. *United States ex rel. McCann*, *supra*, p. 274. There have been, however, some exceptions. That is to say, the writ has at times been entertained either without consideration of the adequacy of relief by the appellate route or where an appeal would have afforded an adequate remedy. Illustrative are those instances where the conviction was under a federal statute alleged to be unconstitutional,[6] where there was a conviction by a federal court whose jurisdiction over the person or the offense was challenged,[7] where the trial or sentence by a federal court violated specific constitutional guaranties.[8] It is plain, how-

[5] See note 2, *supra*.

[6] *Ex parte Siebold*, 100 U. S. 371; *Ex parte Curtis*, 106 U. S. 371; *Ex parte Yarbrough*, 110 U. S. 651; *In re Coy*, 127 U. S. 731; *Matter of Heff*, 197 U. S. 488; *Matter of Gregory*, 219 U. S. 210; *Baender* v. *Barnett*, 255 U. S. 224.

[7] *Ex parte Watkins*, 3 Pet. 193; *Ex parte Parks*, 93 U. S. 18; *Bowen* v. *Johnston*, 306 U. S. 19.

[8] *Ex parte Lange*, 18 Wall. 163 (double jeopardy); *In re Snow*, 120 U. S. 274 (same); *In re Nielsen*, 131 U. S. 176 (same); *Counselman* v. *Hitchcock*, 142 U. S. 547 (self-incrimination); *Ex parte Wilson*, 114 U. S. 417 (requirement of indictment); *Ex parte Bain*, 121 U. S. 1 (same); *Callan* v. *Wilson*, 127 U. S. 540 (jury trial); *Johnson* v. *Zerbst*, *supra* (right to counsel); *Walker* v. *Johnston*, 312 U. S. 275 (same); *Waley* v. *Johnston*, *supra*, (coerced plea of guilty).

ever, that the writ is not designed for collateral review of errors of law committed by the trial court—the existence of any evidence to support the conviction,[9] irregularities in the grand jury procedure,[10] departure from a statutory grant of time in which to prepare for trial,[11] and other errors in trial procedure which do not cross the jurisdictional line. Cf. *Craig* v. *Hecht*, 263 U. S. 255.

Yet the latter rule is not an absolute one; and the situations in which *habeas corpus* has done service for an appeal are the exceptions. Thus where the jurisdiction of the federal court which tried the case is challenged or where the constitutionality of the federal statute under which conviction was had is attacked, *habeas corpus* is increasingly denied in case an appellate procedure was available for correction of the error.[12] Yet, on the other hand, where the error was flagrant and there was no other remedy available for its correction, relief by *habeas corpus* has sometimes been granted.[13] As stated by Chief Justice Hughes in *Bowen* v. *Johnston*, 306 U. S. 19, 27, the rule which requires resort to appellate procedure for the

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[9] *Harlan* v. *McGourin*, 218 U. S. 442.

[10] *Ex parte Harding*, 120 U. S. 782; *Kaizo* v. *Henry*, 211 U. S. 146.

[11] *McMicking* v. *Shields*, 238 U. S. 99. The rule is even more strict where *habeas corpus* is sought before trial. See *Johnson* v. *Hoy*, 227 U. S. 245.

[12] *In re Lincoln*, 202 U. S. 178; *Toy Toy* v. *Hopkins*, 212 U. S. 542; *Glasgow* v. *Moyer*, 225 U. S. 420.

[13] *Tinsley* v. *Treat*, 205 U. S. 20 (removal case). In removal cases *habeas corpus* is available not to weigh the evidence to support the accusation but to determine whether there is an entire lack of evidence to support it. *Hyde* v. *Shine*, 199 U. S. 62, 84. It is also available to determine whether removal to the district in question violates a constitutional right of the accused, *Haas* v. *Henkel*, 216 U. S. 462, or whether the court before which it is proposed to take and try the accused has jurisdiction over the offense. *Salinger* v. *Loisel*, 265 U. S. 224. But *habeas corpus* will not be entertained to pass on the question of jurisdiction where it involves consideration of many facts and seriously controverted questions of law. *Rodman* v. *Pothier*, 264 U. S. 399; *Henry* v. *Henkel*, 235 U. S. 219.

correction of errors "is not one defining power but one which relates to the appropriate exercise of power." That rule is, therefore, "not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* was apparent." *Id.* p. 27. That case was deemed to involve "exceptional circumstances" by reason of the fact that it indicated "a conflict between state and federal authorities on a question of law involving concerns of large importance affecting their respective jurisdictions." *Id.* p. 27. The Court accordingly entertained the writ to examine into the jurisdiction of the court to render the judgment of conviction.

The same course was followed in *Ex parte Hudgings*, 249 U. S. 378, where petitioner was adjudged guilty of contempt for committing perjury. The Court did not require the petitioner to pursue any appellate route but issued an original writ and discharged him, holding that perjury without more was not punishable as a contempt. That situation was deemed exceptional in view of "the nature of the case, of the relation which the question which it involves bears generally to the power and duty of courts in the performance of their functions, of the dangerous effect on the liberty of the citizen when called upon as a witness in a court which might result if the erroneous doctrine upon which the order under review was based were not promptly corrected. . . ." *Id.* p. 384. Cf. *Craig* v. *Hecht*, *supra*.

The Circuit Courts of Appeals thought that the facts of the present cases likewise presented exceptional circumstances which justified resort to *habeas corpus* though no appeals were taken. In their view the failure to appeal was excusable, since relief by that route seemed quite futile.

But denial of certiorari by this Court in the earlier case imported no expression of opinion on the merits. *House* v. *Mayo*, 324 U. S. 42, 48, and cases cited. The same chief

counsel represented the defendants in the present cases and those in the *Estep* and *Smith* cases. At the time these defendants were convicted the *Estep* and *Smith* cases were pending before the appellate courts. The petition in the *Smith* case was, indeed, filed here about two weeks before Kulick's conviction and about a month after Sunal's conviction. The same road was open to Sunal and Kulick as the one Smith and Estep took. Why the legal strategy counseled taking appeals in the *Smith* and *Estep* cases and not in these we do not know. Perhaps it was based on the facts of these two cases. For the question of law had not been decided by the Court; and counsel was pressing for a decision here. The case, therefore, is not one where the law was changed after the time for appeal had expired. Cf. *Warring* v. *Colpoys*, 122 F. 2d 642. It is rather a situation where at the time of the convictions the definitive ruling on the question of law had not crystallized. Of course, if Sunal and Kulick had pursued the appellate course and failed, their cases would be quite different. But since they chose not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile.

We are dealing here with a problem which has radiations far beyond the present cases. The courts which tried the defendants had jurisdiction over their persons and over the offense. They committed an error of law in excluding the defense which was tendered. That error did not go to the jurisdiction of the trial court. Congress, moreover, has provided a regular, orderly method for correction of all such errors by granting an appeal to the Circuit Court of Appeals and by vesting us with certiorari jurisdiction. It is not uncommon after a trial is ended and the time for appeal has passed to discover that a shift in the law or the impact of a new decision has given increased relevance to a point made at the trial but not pur-

sued on appeal. Cf. *Warring* v. *Colpoys*, *supra*. If in such circumstances, *habeas corpus* could be used to correct the error, the writ would become a delayed motion for a new trial, renewed from time to time as the legal climate changed. Error which was not deemed sufficiently adequate to warrant an appeal would acquire new implications. Every error is potentially reversible error; and many rulings of the trial court spell the difference between conviction and acquittal. If defendants who accept the judgment of conviction and do not appeal can later renew their attack on the judgment by *habeas corpus*, litigation in these criminal cases will be interminable. Wise judicial administration of the federal courts counsels against such course, at least where the error does not trench on any constitutional rights of defendants nor involve the jurisdiction of the trial court.

An endeavor is made to magnify the error in these trials to constitutional proportions by asserting that the refusal of the proffered evidence robbed the trial of vitality by depriving defendants of their only real defense. But as much might be said of many rulings during a criminal trial. Defendants received throughout an opportunity to be heard and enjoyed all procedural guaranties granted by the Constitution. Error in ruling on the question of law did not infect the trial with lack of procedural due process. As stated by Mr. Justice Cardozo in *Escoe* v. *Zerbst*, 295 U. S. 490, 494, "When a hearing is allowed but there is error in conducting it or in limiting its scope, the remedy is by appeal. When an opportunity to be heard is denied altogether, the ensuing mandate of the court is void, and the prisoner confined thereunder may have recourse to *habeas corpus* to put an end to the restraint."

It is said that the contrary position was indicated by the following statement in *Estep* v. *United States*, *supra*, pp. 124–125,

> "But if we now hold that a registrant could not defend at his trial on the ground that the local board had no jurisdiction in the premises, it would seem that the way would then be open to him to challenge the jurisdiction of the local board after conviction by *habeas corpus*. The court would then be sending men to jail today when it was apparent that they would have to be released tomorrow."

We were there examining the alternative pressed on us—that the classification could not be attacked at the trial. If we denied the defense, we concluded that *habeas corpus* would lie the moment after conviction. For one convicted of violating an illegal order of a selective service board, like one convicted of violating an unconstitutional statute, should be afforded an opportunity at some stage to establish the fact. And where no other opportunity existed, *habeas corpus* would be the appropriate remedy.[14] But that was an additional reason for allowing the defense in the criminal trial, not a statement that defendants prosecuted under § 11 had an alternative of defending at the trial on the basis of an illegal classification or resorting to *habeas corpus* after conviction. These registrants had available a method of obtaining the right to defend their prosecutions under § 11 on that ground. They did not use it. And since we find no exceptional circumstances which excuse their failure, *habeas corpus* may not now be used as a substitute.

Accordingly *Sunal* v. *Large* will be affirmed and *Alexander* v. *Kulick* will be reversed.

So ordered.

MR. JUSTICE BURTON concurs in the result.

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[14] The remedy of *habeas corpus* extends to a case where a person "is in custody in violation of the Constitution or of a law . . . of the United States . . ." R. S. § 753, 28 U. S. C. § 453.

pp. 2. 3. 4

SUPREME COURT OF THE UNITED STATES

Nos. 535 AND 840.—OCTOBER TERM, 1946.

Theodore Martin Sunal, Petitioner, 535 *v.* David R. Large, Superintendent, Federal Prison Camp, Mill Point, W. Va.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
Myrl Alexander, Warden, Petitioner, 840 *v.* United States, ex rel. John Myron Kulick.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 23, 1947.]

MR. JUSTICE FRANKFURTER, dissenting.

That *habeas corpus* cannot be made to do service for an appeal is a well-worn formula. But this generalization should not dispose of these two cases, if their actualities are viewed in the light of our decisions.

The First Judiciary Act empowered the courts of the United States to issue writs of *habeas corpus*. Section 14 of the Act of September 24, 1789, 1 Stat. 73, 81. Since the scope of the writ was not defined by Congress, it carried its common law implications. The writ was greatly enlarged after the Civil War by the Act of February 5, 1867. 14 Stat. 385. (For legislation dealing with *habeas corpus* see note in 18 F. 68.) It was no longer limited to searching the face of a judgment of a court of competent jurisdiction. It was available to cut through forms and go "to the very tissue of the structure," Mr. Justice Holmes in *Frank* v. *Mangum*, 237 U. S. 309, 345, 346, though it was certainly not to be invoked merely as

a substitute for an available appeal. But what is "form" and what is the "tissue of the structure," and when is a writ sought in fact as a substitute for an appeal in a practical view of the administration of justice, are questions to which our decisions give dubious and confused answers. I think it is fair to say that the scope of *habeas corpus* in the federal courts is an untidy area of our law that calls for much more systematic consideration than it has thus far received.

The extent to which this Court has left itself unhampered, by not drawing sharp jurisdictional lines, is indicated by the following very tentative classification of categories in which *habeas corpus* has not been deemed beyond the power of federal courts to entertain:

(1) Conviction by a federal court which had no jurisdiction either over the person or of the offense. See *Ex parte Watkins*, 3 Peters 193, 203; *Ex parte Parks*, 93 U. S. 18, 23. But the writ is discretionary and may not issue even though if an opportunity were allowed such want of jurisdiction might be established. See *Toy Toy* v. *Hopkins*, 212 U. S. 542, and *Rodman* v. *Pothier*, 264 U. S. 399. And compare *In re Mayfield*, 141 U. S. 107, with *In re Blackbird*, 66 F. 541.

(2) Conviction under unconstitutional statute. *Ex parte Virginia*, 100 U. S. 339, 343; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Curtis*, 106 U. S. 371; *Ex parte Yarbrough*, 110 U. S. 651. The writ was denied in each case, but the Court passed on the constitutionality of the statute. Here too the availability of the writ will depend on the circumstances of the case, particularly the stage in the criminal proceedings at which the writ is sought. *Johnson* v. *Hoy*, 227 U. S. 245; *Henry* v. *Henkel*, 235 U. S. 219. Compare *Glasgow* v. *Moyer*, 225 U. S. 420 with *Matter of Gregory*, 219 U. S. 210. See also *In re Lincoln*, 202 U. S. 178.

(3) Violation by federal courts of specific constitutional rights: (a) double jeopardy. Compare *Ex parte Bigelow*, 113 U. S. 328, with *In re Snow*, 120 U. S. 274, and *Nielsen, Petitioner*, 131 U. S. 176; (b) self-crimination. Writ granted as to a witness held in contempt, though apparently not as to a defendant restrained on charge of crime. Compare *Counselman* v. *Hitchcock*, 142 U. S. 547, and *Ex parte Irvine*, 74 F. 954 (Taft, Circuit Judge), with *Matter of Moran*, 203 U. S. 96; (c) No indictment by grand jury. *Ex parte Wilson*, 114 U. S. 417. Also *Ex parte Bain*, 121 U. S. 1. As to denial of constitutional rights in State courts, *Moore* v. *Dempsey*, 261 U. S. 86.

(4) Due regard for harmonious Nation-State relations, need to avoid friction and maintain balance. See *Ex parte Rowland*, 104 U. S. 604; *In re Ayers*, 123 U. S. 443; *In re Sawyer*, 124 U. S. 200; *Bowen* v. *Johnston*, 306 U. S. 19. Compare *In re Tyler*, 149 U. S. 164; *In re Swan*, 150 U. S. 637; *Ex parte Young*, 209 U. S. 123. Availability of other remedies is here an important factor. Similarly as to State interference with federal officers, prompt relief may be deemed necessary. *Ohio* v. *Thomas*, 173 U. S. 276. See also *In re Neagle*, 135 U. S. 1; *Hunter* v. *Wood*, 209 U. S. 205.

(5) Insufficiency of indictments is not open on *habeas corpus*. It may be in removal cases, in view of the hardship to the individual and the inadequacy of other remedies. Compare *Tinsley* v. *Treat*, 205 U. S. 20; also *Hyde* v. *Shine*, 199 U. S. 62. Compare also the extradition cases, *Benson* v. *McMahon*, 127 U. S. 457; *Ornelas* v. *Ruiz*, 161 U. S. 502; *Bryant* v. *United States*, 167 U. S. 104.

(6) Defects in jury panel, in trial procedure, exclusion or insufficiency of evidence, are rarely held ground for relief on *habeas corpus*. But when no other remedy was available and the error appeared flagrant, there have been instances of relief. See *Tinsley* v. *Treat*, 205 U. S. 20. Compare *Ex parte Bain*, 121 U. S. 1.

(7) Legality of sentence or conditions of confinement: *Ex parte Lange*, 18 Wall. 163; *In re Bonner*, 151 U. S. 242.

(8) Contempt cases: *Ex parte Hudgings*, 249 U. S. 378, 384. Compare, *Savin, Petitioner*, 131 U. S. 267, and *Cuddy, Petitioner*, 131 U. S. 280. But when appeal was sufficient remedy, see *Craig* v. *Hecht*, 263 U. S. 255, and Judge Learned Hand's dissenting opinion in this case below, 282 F. 138, 155.

Perhaps it is well that a writ the historic purpose of which is to furnish "a swift and imperative remedy in all cases of illegal restraint," see Lord Birkenhead, L. C., *Secretary of State for Home Affairs* v. *O'Brien*, [1923] A. C. 603, 609, should be left fluid and free from the definiteness appropriate to ordinary jurisdictional doctrines. But if we are to leave the law pertaining to *habeas corpus* in the unsystematized condition in which we find it, then I believe it is true of both cases what Judge Learned Hand said of the *Kulick* case, that the writ is necessary "to prevent a complete miscarriage of justice." 157 F. 2d 811, 813. If the justification need be no more definite than the existence of "exceptional circumstances," *Bowen* v. *Johnston*, 306 U. S. 19, 27, the reasons for allowing the writs in these cases are more compelling than were those in *Bowen* v. *Johnston*, where there merely appeared "to be uncertainty and confusion . . . whether offenses within the . . . National Park are triable in the state or federal courts." For the reasons set forth in Judge Hand's opinion, it "would pass all fair demands upon Kulick's diligence to conclude him because of his failure to appeal." 157 F. 2d at 813.

I agree with both Circuit Courts of Appeals that *habeas corpus* was available as a remedy in the circumstances of these cases, but since the Court does not consider the merits, I shall abstain from doing so.

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[June 23, 1947.]

MR. JUSTICE RUTLEDGE, dissenting.

I am in agreement with MR. JUSTICE FRANKFURTER in the result and substantially in the views he expresses. I would modify them by making definite and certain his tentatively expressed conclusion that the great writ of *habeas corpus* should not be confined by rigidities characterizing ordinary jurisdictional doctrines. And I agree with Judge Learned Hand, in the view stated for the Circuit Court of Appeals in Kulick's case, that upon the sum of our decisions,[1] regardless of the variety of statement in the opinions, no more definite rule is to be drawn out than that "the writ is available, not only to determine points of jurisdiction, stricti juris, and constitutional

[1] Including those cited in the Court's opinion and that of MR. JUSTICE FRANKFURTER. See also dissenting opinion, *Ex parte Craig*, 282 F. 138, 155–159, affirmed in *Craig* v. *Hecht*, 263 U. S. 255; The Writ of Habeas Corpus in the Federal Courts (1935) 35 Col. L. Rev. 404.

questions; but whenever else resort to it is necessary to prevent a complete miscarriage of justice." 157 F. 2d 811, 813.

In my opinion not only is this the law, measured by the sum of the decisions and the applicable statute,[2] but the aggregate of the results demonstrates it should be the law.

Confusion in the opinions there is, in quantity. But it arises in part from the effort to pin down what by its nature cannot be confined in special, all-inclusive categories, unless the office of the writ is to be diluted or destroyed where that should not happen. And so limitation in assertion gives way to the necessity for achieving the writ's historic purpose when the two collide. Admirable as may be the effort toward system, this last resort for human liberty cannot yield when the choice is between tolerating its wrongful deprivation and maintaining the systematist's art.

The writ should be available whenever there clearly has been a fundamental miscarriage of justice for which no other adequate remedy is presently available. Beside executing its great object, which is the preservation of personal liberty and assurance against its wrongful deprivation, considerations of economy of judicial time and procedures, important as they undoubtedly are, become comparatively insignificant.[3] This applies to situations

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[2] Rev. Stat. § 761, 28 U. S. C. § 461, which commands the court, after hearing to "dispose of the party as law and justice require." Cf. *Frank* v. *Mangum*, 237 U. S. 309, 330, 331, and dissenting opinion of Mr. Justice Holmes, at 345 ff., concurred in by Mr. Justice Hughes, who afterward as Chief Justice wrote the Court's opinion in *Bowen* v. *Johnston*, 306 U. S. 19. See note 4. Pertinently the statute applies "to prisoners in custody in violation of the Constitution or of a law or treaty of the United States." Rev. Stat. § 754, 28 U. S. C. § 453.

[3] It is for this reason that the doctrine of *res judicata* does not apply to *habeas corpus* determinations, *Waley* v. *Johnston*, 316 U. S.

involving the past existence of a remedy presently foreclosed, as well as to others where no such remedy has ever been afforded.

In the prevailing state of our criminal law, federal and state, there are few errors, either fundamental or of lesser gravity, which cannot be corrected by appeal timely taken, unless the facts disclosing or constituting them arise after the time has expired. If the existence of a remedy by appeal at some stage of the criminal proceedings is to be taken for the criterion, then in very few instances, far less than the number comprehended by our decisions, will the writ be available. Taken literally, the formula so often repeated, that the writ is not a substitute for appeal, is thus in conflict with every case where the ground upon which the writ has been allowed either was or might have been asserted on appeal.[4]

101, 105, although a prior refusal to discharge the prisoner on a like application may be given weight, *Salinger* v. *Loisel*, 265 U. S. 224, 231, for obvious reasons of judicial administration.

[4] In the following cases the Court either passed upon the substance of the contentions presented in the petition for writ of *habeas corpus* or held that the petitioner was entitled to a hearing, although, so far as appears, at the time the petition was filed the time to appeal had expired, *e. g.*, *Bowen* v. *Johnston*, 306 U. S. 19; *Walker* v. *Johnston*, 312 U. S. 375; *Johnson* v. *Zerbst*, 304 U. S. 458, see The Writ of Habeas Corpus in the Federal Courts (1935) 35 Col. L. Rev. 404, 414, n. 66; an appeal had already been taken, *Moore* v. *Dempsey*, 261 U. S. 86; or the time to appeal had not expired, *Hunter* v. *Wood*, 209 U. S. 205; *Ex parte Sawyer*, 124 U. S. 200; *Wo Lee* v. *Hopkins*, 118 U. S. 356, discussed in The Writ of Habeas Corpus in the Federal Courts, *supra*, at 414, n. 60. See also *Appleyard* v. *Massachusetts*, 203 U. S. 222, 225–226; *Ex parte Bridges*, 2 Woods 428, 430, approved in *Ex parte Royall*, 117 U. S. 241.

In his dissenting opinion in *Ex parte Craig*, *supra* note 1, Judge Learned Hand, reviewing the authorities, said: "The appellant's attempt rigidly to classify these exceptions appears to me more definite than the books warrant. A safer rule is to say somewhat vaguely that they must be occasions of pressing necessity." 282 F. at 156.

The formula has obvious validity in the sense that the writ is not readily to be used for overturning determinations made on appeal or for securing review where no specification has been made or no appeal has been taken of matters not going to make the conviction a gross miscarriage of justice.

But any effort to shut off the writ's functioning merely because appeal has not been taken in a situation where, but for that fact alone, the writ would issue, seems to me to prescribe a system of forfeitures in the last area where such a system should prevail. Certainly a basic miscarriage of justice is no less great or harmful, either to the individual or to the general cause of personal liberty, merely because appeal has not been taken, than where appeal is taken but relief is wrongfully denied.

These considerations apply with special force, though not exclusively, where good reason existed, as I think did here, for failure to note the appeal in the brief time allowed.[5] Whether or not the inferior federal courts were

[5] The opinion of the Circuit Court of Appeals in the *Kulick* case, after stating the summarized effect of our decisions as quoted in the text above, said concerning this case: "The occasion at bar is such; certainly the reasons for allowing it are more compelling than were those in Bowen v. Johnston [see notes 3, 4, *supra*], where there merely appeared 'to be uncertainty and confusion . . . whether offenses within' a national park 'are triable in the state or federal courts.' It would pass all fair demands upon Kulick's diligence to conclude him because of his failure to appeal. Not only had there not been any glimmer of a positive chance of success, but there had been an unusual consensus of judicial opinion against it in the lower courts. Moreover, although a number of the decisions could be explained upon the ground that those inducted had not wholly exhausted their administrative remedies; in a number of others they had done so; and no distinction had been established between the two. Indeed, in United States v. Flakowicz, supra [146 F. 2d 874], which had been one of these, the Supreme Court denied certiorari only a fortnight before May 12th," the date of Kulick's conviction. 157 F. 2d at 813–814. See note 9 *infra*.

justified in taking the *Falbo* decision [6] for more than its specific ruling, the fact remains that their broadly prevailing view was that that case had cut off all right to make such defenses as Sunal and Kulick tendered.[7]

In that prevailing climate of opinion in those courts, there was hardly any chance that appeal to the federal circuit courts of appeals would bring relief by their action.[8] The chances for reversal therefore hung almost exclusively upon the doubtful, not to say slender,[9] chance that this Court in the exercise of its discretionary power would grant certiorari.

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[6] *Falbo* v. *United States*, 320 U. S. 549. The opinion, though containing language emphasizing the failure of Congress to provide expressly for judicial review of selective service boards' classifications, explicitly pointed out that "a board order to report is *no more than a necessary intermediate step* in a united and continuous process designed to raise an army speedily and efficiently" and that, if there were a constitutional requirement for judicial review, "Congress was not required to provide for judicial intervention *before final acceptance* of an individual for national service." Pp. 553, 554. The opinion also stated: "Surely if Congress had intended to authorize interference with that process *by intermediate challenges of orders to report*, it would have said so." P. 554. (Emphasis added.)

[7] See note 5 *supra*, and the cases cited in MR. JUSTICE FRANKFURTER's opinion in *Estep* v. *United States*, 327 U. S. 114, 139.

[8] In reference to Kulick's case the chance was practically nil, since the Circuit Court of Appeals for the Second Circuit previously had ruled the question adversely to the validity of the defenses in *United States* v. *Flakowicz*, 146 F. 2d 874, and certiorari had been denied here. 325 U. S. 851. See note 5.

United States v. *Smith*, 148 F. 2d 288, afterwards reversed here, 327 U. S. 114, apparently was the first in which the Circuit Court of Appeals for the Fourth Circuit decided the question. The decision was rendered April 4, 1945. Sunal was convicted on March 22, 1945.

[9] Although denial of certiorari is not to be taken as expression of opinion in any case, it would be idle to claim that it has no actual or reasonable influence upon the practical judgment of lawyers whether appeal should be noted and taken upon the chance that in a case substantially identical this Court's discretion would be exercised, in the absence of conflict, in a contrary manner at the stage of application for certiorari.

The deprivation here was of the right to make any substantial defense.[10] I do not think a trial which forecloses the basic right to defend, upon the only valid ground available for that purpose, is any less unfair or conclusive as against the office of *habeas corpus* than one which takes place when the court is without jurisdiction to try the offense, as when the charge is made under an unconstitutional statute or for other reason sets forth no lawfully prescribed offense, or when the court loses jurisdiction by depriving the accused of his constitutional right to counsel. That right is no more and no less than an important segment of the right to have any valid defense advanced and considered. It becomes almost meaningless if the larger right to defend is itself cut off.[11]

With MR. JUSTICE FRANKFURTER, since the Court reaches only the question of the availability of *habeas corpus*, I do not consider others.

MR. JUSTICE MURPHY joins in this dissent. He believes that today's decision unduly narrows the point at which due process may be accorded those accused or convicted of violating the Selective Training and Service Act of 1940. Cf. his dissenting opinion in *Falbo* v. *United States*, 320 U. S. 549, 555, and his concurring opinion in *Estep* v. *United States*, 327 U. S. 114, 125.

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[10] Under the rule applied in the district courts and the circuit courts of appeals the only defenses open would have been that the defendants had not refused to take the oaths. No defense relating to the validity of the statute, the regulations, or their application in the particular cases was available.

[11] Cf. *Yakus* v. *United States*, 321 U. S. 414, dissenting opinion, at 460 ff.